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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-277

HENRY C. FORTENBERRY, Father of
GARY C. FORTENBERRY, Deceased,
Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

PETITIONER, HENRY C. FORTENBERRY, Father of GARY C. FORTENBERRY, Deceased, presents this his Petition for a Writ of Certiorari to review a decision of the United States Court of Appeals for the Sixth Circuit, and states:

1. Petitioner seeks to have reviewed the decision of the United States Court of Appeals for the Sixth Circuit rendered and filed May 1, 1972. (Copy of Opinion No. 71-1318, Appendix A, infra)

2. This Petition is presented under and pursuant to the Federal Rules of Civil and Appellate Procedure, and Rule 19 of the Supreme Court of the United States of America.

3. This Petition is accompanied by a certified transcript of the record of the proceedings including the decision Petitioner seeks to have reviewed and a supporting brief.

4. The following are the facts of the case:

STATEMENT OF THE CASE

(A) This case is an action based upon an insurance contract entered into between the defendant New York Life Insurance Company, and the deceased son of the plaintiff, Henry Fortenberry.

(B) This case came on for trial, and at the conclusion of the trial the Court having disposed of motions for directed verdict in plaintiff's favor made by defendant during the course of the trial, entered an order upon the jury verdict in favor of the plaintiff.

(C) After the entry of the verdict of the jury in favor of the plaintiff the defendant filed a motion and amended motion for judgment non obstante veredicto, or, in the alternative, for a new trial.

(D) The District Judge rendered an opinion overruling the grounds asserted in support of a motion for a directed verdict, and upon defendant's motion for judgment n.o.v., but granted the defendant a new trial on the grounds that:

"The Court is not satisfied with the verdict; that is to say, it is not satisfied that the evidence supports the verdict. Upon an examination of each of the jurors concerning their reason in reaching a verdict, it was evident that a number of the jurors was not convinced that the evidence supported plaintiff's theory." (Trial Court's Opinion)

(E) After entry of the order granting defendant a new trial, defendant filed motion for summary judgment which was denied by order of the District Judge.

(F) A transcript of the proceedings was filed and this appeal is taken to review the action of the District Judge in setting aside the jury verdict and in granting defendant a new trial over the objection of the plaintiff.

(G) This matter was heard in the Court of Appeals, Sixth Circuit which rendered an opinion with a dissenting opinion rendered by Judge William E. Miller. (Opinion No. 71-1318, Appendix A, p. 31)

5. On the foregoing facts, the Circuit Court of Appeals was presented with the following points of law:

ARGUMENT

ISSUE

DID THE DISTRICT JUDGE ERR IN SETTING ASIDE JURY VERDICT AND GRANTING DEFENDANT'S MOTION FOR NEW TRIAL UPON THE GROUND THAT "IT (THE COURT) IS NOT SATISFIED THAT THE EVIDENCE SUPPORTS THE VERDICT"?

PLAINTIFF-APPELLANT CONTENDS THE ANSWER SHOULD BE "YES."

To answer the question presented of whether or not the District Judge erred in setting aside jury verdict and grant-

ing defendant's motion for new trial it is encumbent upon us to look to the evidence presented in several respects: First, in what light should the Court view the evidence upon a motion for new trial; second, how should the evidence be tested for sufficiency to support a jury verdict where local law was determinative of the substantive rights of the litigants; and, third, did the District Judge invade the province of the jury by granting motion for new trial upon the grounds stated thereby reweighing the evidence and setting aside jury verdict because he was not satisfied that the evidence supported the verdict.

To answer these questions plaintiff-appellant would ask this Court to consider the following excerpts from the testimony of witnesses which appeared at the trial (transcript). This testimony has been summarized in this argument for the convenience of the Court.

The Evidence

Testimony of Mr. Hal Newman, agent for New York Life Insurance Company: (Questions propounded by plaintiff pursuant to Rule 43(B).)

Mr. Newman testified that he had seen the deceased, Gary Fortenberry on only two occasions after delivering the insurance policy to him, and Mr. Newman acknowledged that the places where he had seen the deceased Gary Fortenberry were in the office of New York Life Insurance Company and on the street at Walgreen's (drug store) on Gay Street (Tr. 14). This meeting at Walgreen's Drug Store which was acknowledged by Mr. Newman corresponds with the testimony of Officer John D. Faulkner (Tr. 82-91) where Officer Faulkner testified that he was present with the deceased in front of Walgreen's Drug Store on Gay Street when the deceased came in contact with Hal New-

man and the deceased was asking Mr. Newman about changing his insurance policy (Tr. 85), and when Officer Faulkner walked up to the deceased he stated to Mr. Newman, "Have you changed" or "Did you change the policy like I asked?" And Mr. Newman replied "I will change it" or "I am going to change it" (Tr. 89, 90). Mr. Newman in his testimony denied that this particular meeting ever took place or that these statements were made (Tr. 220).

In response to a question to Mr. Newman whether he had previously testified that he had only one telephone conversation with the deceased Mr. Newman answered that he had not stated this (Tr. 14, 15). Mr. Newman's attention was directed to his previously given discovery deposition wherein he stated (at page 13, line 18):

"Q I will ask you whether or not you had any conversation on the phone with him?

"A Yes, sir.

"Q Did you have few or many telephone conversations with him?

"A To the best of my knowledge only one.

"Q One telephone conversation, can you tell me when that was?

"A Yes, sir, June 19th."

When asked whether that was the answer he gave Mr. Newman attempted to explain the obvious conflict by stating:

"Yes, sir. That is prior to June 27th." (Tr. 15). Mr. Newman later in testifying stated that the deceased called on the 27th and asked that the policy be cancelled (Tr. 201, 202). To raise issue further with this state-

ment by Mr. Newman, Theodore H. Fortenberry testified he was with the deceased the day before he was killed the 27th and they discussed the insurance policy and no mention was made of its cancellation (Tr. 111, 112).

Mr. Newman testified that the deceased did not call him at home the night of June 19th (Tr. 20). This was disputed by the testimony of Henry Fortenberry who testified that his son made a call and asked for Mr. Hal Newman at about 7:00 p.m. the night of June 19th (Tr. 48), and was further disputed by the testimony of Lois Fortenberry (Tr. 125, 126).

Mr. Newman testified that he did not talk to deceased by telephone on the afternoon of June 20th (Tr. 21). This was disputed by the testimony of Henry Fortenberry (Tr. 51) and the testimony of Theodore L. Tillson (Tr. 102, 103).

Mr. Newman testified that he did not receive a call from deceased on June 25th (Tr. 21). This testimony was disputed by testimony of Theodore H. Fortenberry (Tr. 110).

Testimony of Henry Fortenberry:

Mr. Fortenberry testified that he saw the deceased look up the number, make a call, and ask for Mr. Hal Newman and talk with Mr. Newman at about 7:00 p.m. on June 19th (Tr. 48). He testified that on June 20th at approximately 12:00 or 1:00 p.m. the deceased came to his car lot and in his presence and the presence of Theodore Tillson and Sam Abby, customers, made a phone call to the New York Life Insurance Company office and asked for Mr. Newman (Tr. 52); that deceased made other statements of present intent to change the beneficiary of his insurance policy (Tr. 54); that shortly after the

death of his son Mr. Fortenberry called Mr. Newman the day after the funeral and made an appointment to see him and asked Mr. Newman, "How many times has Gary approached you about changing this policy" and Mr. Newman stated "Approximately three" (Tr. 58, 59, 60). Mr. Newman then volunteered that the three places that these requests were made were at his home, his office, and on Gay Street at Walgreen's Drug Store (Tr. 59). Mr. Fortenberry also testified that when he asked why he did this (change beneficiary of deceased wife's policies) and not change the beneficiary on deceased's policy Mr. Newman stated, "Mr. Fortenberry, I felt obligated to Elaine and her mother because Elaine's mother got me my job eight years ago with this company, and in a sense gave me a lot of business and helped me other ways." And Newman further expressed that he felt that they would "go back together" (Tr. 59). Mr. Newman in response to a later telephone call from Mr. Fortenberry asking for the address of the main office of New York Life Insurance Company and informed that a suit might result stated, "No matter what you do I will deny everything I said" (Tr. 60, 61).

Testimony of John David Faulkner:

Mr. John Faulkner testified that he met the deceased, Gary Fortenberry downtown on about the 10th or 11th of July to see deceased about entrance fee for a bowling tournament, the entry forms had to be submitted by the 14th (Tr. 84). This was the same tournament scheduled for the 28th that the deceased was enroute to when he was killed. Mr. Faulkner then testified that when he met deceased at Walgreen's Drug Store, the deceased and Mr. Hal Newman were discussing business and when Mr. Faulkner walked up Gary Fortenberry, the deceased, was asking him (Newman) about changing an insurance

policy (Tr. 85), and when I walked up Mr. Fortenberry (deceased) said, "Have you changed the policy and beneficiary yet?" And that Mr. Newman's reply was, "I will change it" or "I am working on it" (Tr. 86, 89). When Mr. Faulkner was asked to state as accurately as he could the statements of both deceased and Mr. Newman the reply was, "Well, sir, I couldn't quote it word for word but the general treatment or the question was "Have you changed" or "Did you change the policy like I asked?", and the reply was, "I will change it" or "I am going to change it" or something to that effect (Tr. 89, 90). Mr. Faulkner also testified about statements of deceased of a present intention to change beneficiary of the policy (Tr. 91).

Testimony of Theodore L. Tillson:

Theodore Tillson testified that he was at Henry's Auto Sales about 11:00 or 2:00 p.m. on the 20th (Tr. 101, 102), that the deceased came into the room, picked up the phone and called, he dialed a number and said, "I would like to speak to Mr. Hal Newman" (Tr. 103). This call was denied by Mr. Newman (Tr. 21). Mr. Tillson also heard the statement by the deceased during this telephone conversation to change the policy. This testimony was introduced only for the limited purpose of showing the present intent of deceased at that time and the jury was so instructed (Tr. 103, 104).

Testimony of Theodore Harrison Fortenberry:

This witness testified that he saw the deceased on the Monday before he was killed which was the 25th (Tr. 108) and saw him again on Wednesday the 25th. On the 23rd he expressed his intent to change the beneficiary of his insurance policy and on the 25th the deceased asked to use the phone and this witness heard him say, "Hal" and was able to determine from the conversation that deceased and the other party were discussing insurance (Tr. 110).

Mr. Newman denied receiving any such call on the 25th (Tr. 21).

Theodore Fortenberry testified that he saw the deceased Friday evening the 27th the night before he was killed at about 6:30 or 7:00 p.m. Deceased's insurance policy was discussed and the deceased said nothing to indicate that he had cancelled the policy (Tr. 112). Note in this connection it is the position of the defendants that deceased called on the 27th and told Mr. Newman to cancel the policy (Tr. 201, 202).

Testimony of Mrs. Henry Fortenberry:

Mrs. Fortenberry on the 19th day of June met deceased's wife downtown, and they had lunch at Lyle's Restaurant and learned that Elaine Simpson Fortenberry had been to Hal Newman's office, had changed the beneficiary on her policies, and while there Mr. Newman received a call from deceased (Tr. 121), that late in the afternoon of the 19th he (deceased) went to the phone and he got the phone book and called Hal Newman (Tr. 125) and he discussed change of beneficiary during this conversation (Tr. 126). Mr. Newman denied receiving such a call or that he discussed insurance with deceased the night of the 19th (Tr. 21).

Mrs. Fortenberry testified that she accompanied her husband to the office of New York Life Insurance Company to see Mr. Hal Newman after the death of her son and that her husband asked Mr. Newman if he had changed the insurance like Gary (the deceased) had asked him to and he said no, that Elaine was beneficiary (Tr. 128), that when asked why he hadn't been equally fair since he had changed the beneficiaries of Elaine's policies he said, "I feel obligated to Elaine and her mother. Her mother got me my job eight years ago, and Elaine has got me an

awful lot of business" (Tr. 128). Mr. Newman when asked how many times he had been asked to change the beneficiary on deceased's policy stated that he had been asked on three occasions, when he had seen him in Walgreen's Drug Store, at his office and he called him from home (Tr. 128, 129).

After hearing these excerpts from the testimony along with all other testimony presented in the trial of this case, the Court charged the jury and the following excerpt is from the instructions given to the jury by Judge Taylor:

Charge of Court:

The Court in its instructions to the jury stated "When you reach a verdict, which of course has to be unanimous, you will return in open court and you will state, in effect or in substance, that 'We find for' one or the other of the parties. You can find for the defendant, and if you do you simply say 'We find for the defendant' and that ends your duty in this case, *you don't have to give the reason*. If you find for the plaintiff you simply say, "We find for the plaintiff.' You don't have to give a reason." (Court's Charge p. 11).

After receipt of the verdict the District Judge contrary to what he had previously told the jurors that "You don't have to give a reason" inquired of the jury to give the reasons upon which they based their verdict and the following discourse occurred between the Judge and jury:

Discourse Between Court and Jury Panel:

"THE COURT: Mr. Foreman, have you arrived at a verdict?

"THE FOREMAN: We have, Your Honor.

"THE COURT: What is the verdict?

"THE FOREMAN: We find for the plaintiff.

"THE COURT: You find for the plaintiff?

"THE FOREMAN: We find for the plaintiff.

"THE COURT: Will you please hold up your hand, each one of you, if that is your verdict?

"(All members of the jury indicated in the affirmative.)

"THE COURT: Will you state the basis of your verdict for the Court. How did you reach the verdict?

"THE FOREMAN: Well, actually, it was reached on the majority. It was eight to four. It was originally five to seven and finally it went to eight to four and the others went along.

"THE COURT: It isn't the numbers. I want to know the reasoning that was used to reach the verdict, the reasoning. Tell me the reasoning that you used.

"THE FOREMAN: Well, most of it was based on the witnesses, whether or not that we sincerely believed what they had said.

"THE COURT: What did they say; what did they say?

"THE FOREMAN: As to whether or not we believed——

"THE COURT: Yes, believed what, for example; believed what? I want to know the basis, the factual basis.

"THE FOREMAN: Frankly, since we have opened the discussion here on this case, this is the worse I have ever been on.

"THE COURT: Do you know the basis, the reasoning that you used in reaching that verdict? Do you?

"A JUROR: I felt, Your Honor, like this boy had made contact with this agent and let him know that was his intention of having this thing changed.

"THE COURT: All right. Now what was the basis that you used?

"THE JUROR: Mine was the same as his.

"THE COURT: You felt what——

"THE JUROR: Felt that he had made contact with the agent and the agent hadn't made sufficient effort to carry through his wishes.

"THE COURT: You feel that the evidence showed, that the evidence that was admitted by the Court showed that?

"THE JUROR: Yes.

"THE COURT: All right. What was your basis of your verdict?

"A JUROR: About the same as those, Your Honor, that he had put forth an effort to get the change made and that the agent was a little derelict in carrying out his wishes.

"THE COURT: Now, lady, what is the basis of your verdict?

"A JUROR: I believed that the decedent did contact the agent and make an effort to make this change in the policy that he wanted it changed.

"THE COURT: You felt the evidence showed that?

"THE JUROR: Yes.

"THE COURT: All right. Lady, what is your verdict?

"A JUROR: I believe that he had made a reasonable effort to contact the agent and he was negligent in his instructions to the boy.

"THE COURT: You mean the agent was negligent in his instructions to the deceased?

"THE JUROR: Yes. If he needed to go further, the agent should have told him.

"THE COURT: You mean by that that you felt that the evidence showed that he made known to the agent that he wanted the beneficiary changed?

"THE JUROR: I don't think we were too sure of that.

"THE COURT: What about you—he made known—did you find evidence, or any evidence in the record that he made known, that is the deceased, to the agent of the company that he wanted this—him to change the beneficiary?

"A JUROR: Well, on any evidence, I based it on the witnesses.

"THE COURT: Yes, I understand, but—

"THE JUROR: I believe that he did.

"THE COURT: He made known?

"THE JUROR: He had made known to the company that he wanted a change in the beneficiary on the policy.

"THE COURT: What about you?

"A JUROR: That is my thinking, yes, sir.

"THE COURT: What about you?

"A JUROR: Yes, sir.

"THE COURT: What about you?

"A JUROR: Yes, sir.

"THE COURT: What about you?

"THE FOREMAN: I would think so; yes, sir.

"THE COURT: What was your reasoning, Mr. Juror?

"A JUROR: Your Honor, I was one of the four that went along with the rest of the jury.

"THE COURT: What did you base your reasoning on, what factual evidence did you base it on?

"THE JUROR: Based it on just like the rest of them, based on the testimony of the witnesses.

"THE COURT: That what?

"THE JUROR: That's right.

"THE COURT: That the witnesses, what? What did you feel that the evidence showed that the deceased did and what the agent of the company did?

"THE JUROR: Well, as you know, I believed contrary to the rest of them and I went along with the ma-

jority rule. I didn't believe it showed the contact.

"THE COURT: What was the basis of yours, Mr. Whitehead?

"JUROR WHITEHEAD: Your Honor, I felt that, from the witnesses' testimony, that he had contacted the agent, that he had made an effort to get this beneficiary changed, and I think it was implied in there that he did contact them before, from the evidence presented, and that for some reason or other the form was not filed, that he had made some effort to do so.

"THE COURT: What was your reasoning, Mr. Juror?

"A JUROR: Sir, I am one of the four. Could I say more?

"THE COURT: Sir?

"THE JUROR: Am I allowed to say any more?

"THE COURT: Well, if you want to say—what the Court is trying to find out, the evidence that the jury based its verdict on. If you want to point out any evidence, the Court will hear you.

"THE JUROR: No, I merely went along to get, you know, really, I didn't think there was enough evidence.

"THE COURT: Well, what was the basis of your verdict?

"THE JUROR: I was the other four, with the others. I am going to put it this way, I don't know. Eight of them seemed to think that he made contact with the agent. Personally, I don't think he went far enough, but I went with the rest of them for there was nothing that says that he didn't telephone him. I don't think he ever went to the office.

"THE COURT: I see. Did you feel that he told the agent in his telephone message that he——

"THE JUROR: Sir, let's put it this way. Eight of them did. As far as telephone messages that came

out here on the stand, I don't believe it was brought out that he told him that.

"THE COURT: All right. Mr. Russell, isn't it?

"JUROR RUSSELL: Yes, sir.

"THE COURT: Mr. Russell, what is your basis? What evidence did you base your verdict on?

"JUROR RUSSELL: Well, I was like this fellow there, I couldn't see that he had contacted—proved that he had tried too much to have it changed from the —he called on the telephone, and so I just went along with the rest of them then.

"THE COURT: Now, what is your name?

"JUROR KAGLEY: Kagley.

"THE COURT: What was the basis of your verdict?

"JUROR KAGLEY: Well, I think he possibly made a telephone call, but I don't know whether he ever got to the office or not.

"THE COURT: All right."

First: In what light should the Court view the evidence upon a motion for new trial?

It is a well recognized rule that upon a motion for new trial, testimony and inferences reasonably deductible therefrom must be viewed in light most favorable to plaintiff. This view is affirmed in the case of *Moore v. Rosecliff Realty Corporation*, 88 F. Supp. 956 at page 958 where it stated.

"It must be conceded that the evidence, the testimony and the inferences reasonably deductible therefrom, must be viewed in the light most favorable to the plaintiff." *Moore v. Rosecliff Realty Corporation, supra*. Also citing *Waldron v. Aetna Casualty & Surety Co.*, 3 Cir., 141 F.2d 230, 234; *Morgan v. Pittsburgh-DesMoines Steel Co.*, 166 F.2d 908, 916.

In the *Morgan v. Pittsburgh-DesMoines Steel Co.* case *supra*, the Court stated the same rule in the following language by referring to rule as a 'familiar principle';

> " ... calls for the application of the familiar principle that the plaintiff's evidence and inferences legitimately to be drawn from it must be taken at face value." And then went on to say "The only question is whether plaintiff has made out a case which should have been submitted to a jury."

Other recent cases which adhere to this rule are: *Perkins v. Henry J. Kaiser Const. Co.*, wherein the Court stated that defendant's motion for judgment notwithstanding verdict or in alternative for new trial must be considered in light of evidence most favorable to plaintiff's position. Federal Rules of Civil Procedure Rule 50(B), 28 U.S.C.A., *Perkins v. Henry J. Kaiser Const. Co.*, 236 F. Supp. 484 affirmed 339 F.2d 703.

Also see *Miller v. Cincinnati N.O. & T.P. Ry. Co.*, 203 F. Supp. 107 affirmed 317 F.2d 693, and *Smith v. Insurance Co. of North America*, 213 F. Supp. 675, affirmed in part, refused in part. *Trice v. Commercial Union Assur. Co.*, 334 F.2d 673, cert. den. 85 S. Ct. 895, 38 U.S. 915, 13 L. Ed. 2d 801, appeal after remand 397 F.2d 889 cert. den. 89 S. Ct. 623, 393 U.S. 1018, 21 L. Ed. 2d 563.

Plaintiff-appellant respectfully contends that the evidence should be viewed in light most favorable to plaintiff, and that all conflicts must be resolved in plaintiff's favor, and that all legitimate inferences from such evidence must be drawn in plaintiff's favor, and in favor of jury verdict and a new trial should only be awarded if verdict was against *'great weight of the evidence.'* (Emphasis supplied). *Smith v. Insurance Co. of North America, supra.*

Second: How should the evidence be tested for sufficiency to support a jury verdict where local law was determinative of the substantive rights of the litigants?

Plaintiff-appellant contends that the evidence should be tested for sufficiency by the Tennessee law under the authority of *Waldron v. Aetna Casualty & Surety Co.*, 141 F.2d 230 where the Court stated:

> "Jurisdiction of the case resting upon diversity of citizenship, the substantive rights of the parties are to be determined according to local law." Citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487.

This view is also stated in the restatement of conflicts of law (1934) 311, also see *Moore v. Rosecliff Realty Corp., supra.*

> "The sufficiency of the evidence thus viewed must be tested by the local law where, as here, the local law is determinative of the substantive rights of the litigants." Citing *Waldron v. Aetna Casualty & Surety Co., supra*, and *Morgan v. Pittsburgh-Des Moines Steel Co.*, 166 F.2d 908, 916.

In this regard plaintiff-appellant contends that the evidence taken in its most favorable light, and all legitimate inference therefrom are drawn in plaintiff's favor, and the evidence tested for sufficiency under the Tennessee law that the evidence supports the verdict of the jury. Plaintiff-appellant respectfully directs the Court's attention to the Tennessee case of *Mutual Savings Life Insurance Co. v. Cowan*, 188 F. Supp. 148 (1960) and other Tennessee cases hereinafter cited which deal with change of beneficiary of an insurance policy under Tennessee law.

The Court in the case of *Mutual Savings Life Insurance Company v. Cowan, supra*, discussed change of beneficiary and therein announced two rules which in the opinion of the Court were controlling in that case.

> "[1] The first rule is that where the consent of the insurance company is not required to change the named beneficiary in the policy an announced intention of the assured to change the beneficiary is not alone sufficient to effect the change.
>
> "[2] The second is that if the assured declares his unqualified intention to change the beneficiary and if he does everything he can under the circumstances to effect the change, the equity maxim applies which treats that as done which ought to be done."

In that case the Court held that the deceased policyholder advised the Company's agent that he wanted to change the beneficiary to his wife but the agent had no forms and did not expeditiously request forms from the company which in turn was not prompt in sending forms to the agent and under the Tennessee law it was held that the policyholder had done everything he was able to do to effect a change of beneficiary and the Court would regard that the beneficiary had been changed as intended by the policyholder.

In this case the Court briefly discussed the eight Tennessee cases dealing with the subject, i.e. *Davis v. Davis*, (1916) 136 Tenn. 520, 190 S.W. 459. *Cronbach v. Aetna Life Insurance Company*, (1925) 153 Tenn. 362, 284 S.W. 72. *Holmes v. Gooch*, 3 Tenn. App. 80. *Page v. Detroit Life Insurance Company*, (1929) 11 Tenn. App. 417. *National Life and Accident Insurance Company*

v. Bryant, (1943) 27 Tenn. App. 294, 179 S.W.2d 937. *Barnes v. Prudential Insurance Company*, (1944) 28 Tenn. App. 109, 186 S.W. 2d 918. *Holmes v. Interstate Life and Accident Insurance Company*, (1946) 29 Tenn. App. 482, 197 S.W.2d 551 and *Life and Casualty Insurance Company of Tennessee v. Cornish*, (1958) 315 S.W.2d 6.

In the Cowan case the Court quoted with approval the case of Providence Life and Accident Insurance Company v. Dotson, et al., D.C.S.D. W. Va. 93 F. Supp. 538 wherein the Court stated

> "The intention and efforts of the assured to change his beneficiary may not be defeated by the negligence of the company's agents in failing to make available to him the appropriate form upon which to make written request for change of beneficiary."

In the Cowan case the Court found that the assured took such steps in achieving this policy change that were possible under the circumstances to effect his intent to achieve the beneficiary change and that equity would not require the impossible but would treat that as done which ought to be done.

Republic National Life Insurance Company v. Sackmann, (1963) 324 F. Supp. 356 deals with a case wherein the Court found that the policyholder did no more than express an unexecuted intention to effect the policy change and for the purpose of this brief it is conceded that the law in Tennessee is that mere expression of an intent to change the beneficiary or the unexecuted intention to change the beneficiary is not sufficient but that the test is as quoted in the Sackmann case.

> "Under the authorities in Tennessee the beneficiary in an insurance policy may be effectively changed if the assured substantially complies with the provisions of the policy for the change of beneficiary. The test of

substantial compliance is whether the insured had done everything that he could do to make the change. The import of this is that he must convey to the company or its agent a request for the change of beneficiary. A mere unexecuted intention on the part of the insured is not enough."

This language is found in the Sackmann case cited on page 758 whereupon the Court listed the cases where the change of beneficiary was not effective and then listed a line of cases where the change of beneficiary was held to be effective.

Thus under the authorities it seems to be clear that the test is of substantial compliance and executed intention rather than that of mere unexecuted intention to effect a policy change.

As to the question of fraud, negligence and misrepresentation it is clear under the Cowan case and the other authorities heretofore cited that if the company or its agents were guilty of negligence of other acts of dereliction of duty in preventing the clear and express intention of the policyholder from making the change that the Court would hold that the maxim equity would apply and regard that as done which ought to be done. The Court in the case of *Holmes v. Gooch*, *supra*, stated:

"Of course, if the assured was prevented from making the change by the Insurance Company, its agents, the original beneficiary or other person, and he did all that was reasonably within his power to effect the change the result might be different."

Consequently it is respectfully submitted to the Court that the question of fraud, misrepresentation, negligence and substantial compliance with the policy provisions and

the question of whether the policyholder did everything he could under the circumstances to change the beneficiary should be submitted to the jury for determination.

It is respectfully submitted that the following language from the Cowan case states the Tennessee law on this subject:

> "An assured will not be defeated in his efforts to change a beneficiary by the fault of the company if the insured did everything that he could do under the circumstances to change the beneficiary, equity will not require the impossible but will treat that as done which ought to be done.",

and under the evidence presented when tested for sufficiency under Tennessee law plaintiff-appellant respectfully contends that a question of fact was formulated as to whether insured did everything he could under the circumstances to change the beneficiary and this question was one for the jury to determine.

Third: Did the District Judge invade thé province of the jury by granting motion for new trial upon the grounds stated, thereby reweighing the evidence and setting aside jury verdict because he was not satisfied that the evidence supported the verdict?

In the case of *Moore v. Rosecliff Realty Corporation*, *supra*, the Court in considering this question said:

> "The testimony of the witnesses called by the respective parties was in conflict. It was, however, the exclusive province of the jury to judge the credibility of the witnesses, to weigh the testimony, and to draw inferences from the credible testimony." *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35, 64 S. Ct.

409, 88 L. Ed. 520. *Lavender v. Kurn*, 327 U.S. 645, 653, 66 S. Ct. 740, 90 L. Ed. 916. *Travelers Ins. Co. v. Warrick*, 5 Cir., 172 F.2d 516, *Shiffer v. Pennsylvania Ry. Co.*, 3 Cir., 176 F.2d 368.

See also *Bennett v. Busch*, 75 N.J.L. 240, 67 A. 188, 189; *Emery v. Fritchey*, 112 N.J.L. 161, 169 A. 828, 829; *Jackson v. Delaware, L. & W. R. Co.*, 111 N.J.L. 487, 170 A. 22, 23. The courts "are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant v. Peoria P. U. Ry. Co.*, *supra*; *Casey v. American Export Lines*, 173 F.2d 324, 328; See also *Finnegan v. Goerke Co.*, 106 N.J.L. 59, 147 A. 442, 443; *Nusser v. United Parcel Service of New York*, 3 N.J. Super. 64, 65 A.2d 549, 551, and the other cases herein cited.

The general principle which must be applied was succinctly stated by the Supreme Court in *Tennant v. Peoria & P. U. Ry. Co.*, *supra*, 321 U.S. at page 35, 64 S. Ct. at page 412, 88 L. Ed. 520, as follows: "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. (Citations omitted). That

conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

It was held by the Supreme Court in the case of *Lavender v. Kurn*, *supra*, 327 U.S. at page 652, 66 S. Ct. at page 744, that "it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from the one reached by the jury." It necessarily follows that it would likewise be an undue invasion of the jury's historic function for the trial court to weigh the conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from the one reached by the jury.

And finally did the District Judge err in allowing the jury to impeach their verdict?

Plaintiff-appellant for its final assignment of error would respectfully contend that the District Judge erred in questioning the jury about their reasoning, using their answers to impeach their verdict, and granting a new trial based upon the answers of the jury.

The generally accepted rule is clearly that a juror cannot impeach his own verdict, *Faith v. Neely*, 41 F.R.D. 361, *Holden v. Porter*, 405 F.2d 878 (other citations omitted).

In the case of *Southern Pac. Co. v. Haight*, 126 F.2d 900, certiorari denied 63 S. Ct. 154, 317 U.S. 676, 87 L. Ed. 542, the Court held that a jury verdict cannot be impeached, changed or explained by any jurors' state-

ment, except where used in exceptional circumstances as a basis for showing improper conduct in arriving at the verdict. Also see *Womble v. J. C. Penney Co.*, 47 F.R.D. 350, *Kilgore v. Greyhound Corp., Southern Greyhound Lines*, 30 F.R.D. 385.

Plaintiff-appellant therefore contends that the discussion between the District Judge and jury (supra) was such a verbal impeachment of the jury verdict and was the stated basis of the District Judge granting a new trial (Court's opinion).

On these points of law the District Court of Appeals, Sixth Circuit, rendered the decision printed herein as Appendix A.

These same points of law were involved in the case of *Duncan v. Duncan*, and a decision was rendered by the same Circuit Court of Appeals, Sixth Circuit on the 4th day of May, 1967. This decision was reported in 377 F.2d p. 49, a copy of said decision being included hereto as Appendix B. The facts involved were:

That the Judge at that time for the Middle District of Tennessee, William E. Miller, granted plaintiff's motion for new trial after verdict was returned for defendant in original trial and entered verdicts in favor of plaintiff after second trial, defendant appealed, the Court of Appeals vacated the judgment for plaintiff, order granting plaintiff new trial reversed and case remanded with instructions to reinstate verdict and judgment for defendant.

On these facts the Circuit Court of Appeals, Sixth Circuit ruled as follows in the *Duncan* opinion, Appendix B.

> " ... However, '[c]ourts are not free to reweigh the evidence and set aside the jury verdict merely because

the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 36, 64 S. Ct. 409, 412, 488 L. Ed. 520 (1944); *Werthan Bag Corp. v. Agnew*, 202 F.2d 119, 122 (6th Cir. 1953)."

* * *

"[W]here no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial."

This decision of the Circuit Court of Appeals, Sixth Circuit, which Petitioner seeks to have reviewed is in direct conflict with the above mentioned decision of the same Circuit Court of Appeals because of the reasons and authorities set forth.

Petitioner believes that the opinion herein sought to be reviewed is erroneous and that the decision of the Circuit Court of Appeals, Sixth Circuit in the case of *Duncan v. Duncan*, 377 F.2d 49 (1967) is correct and should be ap-

proved by this Court as the controlling law in the State of Tennessee.

Petitioner further believes that the opinion herein sought to be reviewed is in direct conflict with the opinion rendered in the United States Court of Appeals, Fifth Circuit in the case of O'Neil v. W. R. Grace & Company, 410 F.2d 908 (1969) and that for the reasons and authorities set forth in petitioner's brief that *Duncan v. Duncan*, 377 F.2d 49 (1967) should be approved by this Court as the controlling law of the State of Tennessee. See also *Honaker v. Leonard*, 325 F. Supp. 212 (1971), a case from the Eastern District of Tennessee rendered in 1971 which follows *Duncan v. Duncan*, *supra*.

WHEREFORE, Petitioner respectfully requests this Court to issue a Writ of Certiorari or some other appropriate Writ and enter an Order quashing the decision herein sought to be reviewed and approve the opinion of the District Court of Appeals, Sixth Circuit, in the case of *Duncan v. Duncan* as the correct decision and the controlling law in the State of Tennessee.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

NO. 71-1318

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

HENRY C. FORTENBERRY, Father of GARY C. FORTENBERRY, Deceased,
Plaintiff-Appellant,

v.

NEW YORK LIFE INSURANCE COMPANY,
Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Tennessee, Northern Division

Decided and Filed May 1, 1972.

Before: CELEBREZZE, PECK and MILLER, CIRCUIT JUDGES.

PERCURIAM. Anticipating his marriage which occurred a month later, plaintiff's decedent Gary C. Fortenberry took out a whole life insurance policy with the defendant insurance company. His fiancee was named therein as beneficiary, and as his widow she some six months later filed a death claim under the policy. Pursuant thereto she was paid the face amount ($32,679.00), plus a further

like amount under the double indemnity provisions, since decedent's death in an automobile collision was accidental. Thereafter the plaintiff, decedent's father, filed the complaint in the present action alleging that prior to his death Gary Fortenberry had "ordered [defendant's agent Hal Newman] on at least two occasions to change the beneficiary," and that by reason of the "fraud and misrepresentation" in connection with decedent's request further alleged that the defendant "is now estopped to deny that said beneficiary change was made." In its answer, the defendant quoted the change of benericiary pro-
[fol. 2] vision of the contract of insurance, which was in standard form and provided for such change to be "by written notice in form satisfactory to the Company," and further providing, "No such change will take effect unless recorded in the records of the Company ..."

Upon the issues joined, the case went to trial before a jury, which returned a verdict in favor of the plaintiff. For reasons which hereinafter appear, following the entry of judgment on the verdict the trial judge denied defendant's motion for a judgment notwithstanding the verdict but granted the alternative motion for a new trial. At such new trial, the jury returned a verdict in favor of the defendant, and plaintiff-appellant perfected this appeal from that judgment.

The issue on appeal is whether there was an abuse of discretion on the part of the District Judge in the granting of the new trial, and a resolution of that issue first requires an examination of the circumstances surrounding the returning of the verdict. At that time, the trial judge entered into an extended colloquy with the members of the jury. While in its brief the appellee rather blandly refers to this extended interrogation as a "polling" of

the jury, we do not so view it. A jury is polled to determine whether the announced verdict is in fact the verdict of each of the jurors, and may be accomplished by a questioning of them individually, or, as here, by ascertaining the fact of unanimous concurrence by a general question. Once that fact has been determined, the "polling" is at an end. In the present case, that point had been reached when, after having been asked whether the announced verdict was "your verdict, ... [a]ll members of the jury indicated in the affirmative." However, as previously indicated, the interrogation, which cannot be condoned beyond this point, continued at considerable length, and it can only be concluded that in the course thereof the jury impeached its own verdict. This is contrary to "Lord Mansfield"s Rule," expressed in *Vaise v. Delaval*, 1 Term Rep. 11 (K.B. 1785), and decisions which have followed. See, for example,

[fol. 3] *Jorgensen v. York Ice Machinery Corp.*, 160 F.2d 432 (2d Cir. 1947). The questioning in the present case elicited answers which at the very least cast doubt on the agreement of several jurors with the verdict, but it did not establish such "misconduct" as to provide an exception to Lord Mansfield's Rule.

The granting of the alternative motion for a new trial was accomplished in an oral opinion rendered from the bench by the District Judge, which was subsequently reduced to writing and filed as an order. Therein the trial judge expressed doubt "as to whether there is any evidence in the record to sustain the verdict of the jury," but being "of the opinion that [the Court] should resolve the doubt in favor of the plaintiff" overruled the motion for judgment notwithstanding the verdict of the jury (which, however, was in the oral opinion referred to as a motion for a directed verdict). In the oral opinion it was subsequently stated:

"The Court is not satisfied with the verdict; that is to say, it is not satisfied that the evidence supports the verdict. Upon an examination of each of the jurors concerning their reason in reaching a verdict, it was evident that a number of the jurors were not convinced that the evidence supported plaintiff's theory.

"It is, therefore, ORDERED that the defendant's motion for a new trial be, and the same hereby is, granted."

With reference to this language, it is first observed that appellant inferentially argues that the two sentences expressing the Court's opinion are inseparable and that the granting of the motion for a new trial must therefore necessarily be deemed to have been based on the result of the examination of the jurors. We do not agree. The mere fact that the two sentences appear in the same paragraph does not require that interpretation (especially since the paragraphing was presumably determined by the court reporter).

[fol. 4] The trial judge first stated, "The Court is not satisfied with the verdict; that is to say, it is not satisfied that the evidence supports the verdict." That is clearly a determination by the trial judge himself, arrived at independently from that of the jury. In this context, whether or not a trial judge is "satisfied" with a verdict is dependent upon whether factors are present which under Rule 59(a) place it within the discretionary power of the judge to vacate the verdict and grant a new trial. This Court has repeatedly recognized such discretionary power. *Felton v. Spiro*, 78 Fed. Rep. 576 (6th Cir. 1897), *Cross v. Thompson*, 298 F.2d 186 (6th Cir. 1962), *Mooney v. Henderson Portion Pack Co.*, 339 F.2d 64 (6th Cir. 1964), *Cutter v. Cinn. Union*

Terminal Co., 361 F.2d 637 (6th Cir. 1966), *Hopkins v. Coen*, 431 F.2d 1055 (6th Cir. 1970). Properly read, the second sentence merely demonstrates that some of the jurors were also "not convinced that the evidence supported plaintiff's theory." Thus it seems clear that this sentence was added as an extra string to the trial judge's bow. The Court's independent conclusion as expressed in the first sentence was simply an extension of the conclusion he had earlier stated to the effect that there was not "any evidence in the record to sustain the verdict of the jury." We hold that it was on this basis that the new trial was granted, and that such action constituted a permissible exercise of discretion. This conclusion makes a consideration of the contentions regarding the so-called Allen charge to the jury unnecessary.

Affirmed.

[fol. 5] WILLIAM E. MILLER, dissenting. I regret that I am unable to join in the majority's disposition of this case. It is clear to me that the majority is in error in stating in substance that the new trial was granted by the district judge because he found in effect that there was no evidence in the record to sustain the verdict of the jury. At most, he expressed the view that he was "not satisfied that the evidence supports the verdict."

Earlier in his remarks from the bench he merely made the statement that he had "some doubt as to whether there is any evidence in the record to sustain the verdict of the jury."

It is my understanding of the law that a district judge has no power to set aside a jury verdict merely because he is not satisfied with it, nor because he has some doubt

whether the evidence supports it. He must find that the verdict is contrary to the weight of the evidence, which the district judge in this case manifestly did not do, or he must find that a new trial is necessary to avoid a miscarriage of justice. A federal trial judge is not a thirteenth juror, as a state trial judge is in Tennessee. It is generally not within his province to determine questions of credibility of the witnesses or to weigh the evidence.

This Court in a comparatively recent case, *Duncan v. Duncan*, 377 F.2d 49 (1967), reversed a district judge's order setting aside a verdict and granting a new trial in a personal injury diversity action in Tennessee, even though the district judge made a specific finding that the jury verdict in favor of the defendant was contrary to the "weight of the evidence." In reaching this result the appellate court itself reviewed the evidence, made a finding that the evidence in favor of the plaintiff against the defendant was not "strong" at the first trial, and then proceeded to vacate the order of the district judge granting a new trial and to remand the action with instructions for reinstatement of the original verdict rendered in favor of the defendant. This ruling spells out clearly that this Circuit is committed to a strict rule in reviewing the action of a trial judge in setting aside jury verdicts where [fol. 6] questions of the sufficiency of the evidence are concerned. The rationale of this approach is to protect the litigant's right to a trial by jury.

In the present case the majority holds that the district judge did not abuse his discretion in granting a new trial even though no mention whatever is made of the evidence introduced on behalf of the plaintiff. Nor is the *Duncan* case even so much as referred to. In light of *Duncan*, I am totally unable to see how the Court could conclude

that there was no abuse of discretion without considering the evidence itself to determine whether a jury question was presented. Doubtless the district judge was of the opinion that there was at least some evidence to go to the jury, otherwise it would have been his duty to grant the defendant's motion for judgment n.o.v. rather than to grant a new trial.

Following the principle enunciated in *Duncan* and looking to the evidence on behalf of the plaintiff at the first trial, it is clear to me that there was substantial evidence which required the court to submit the case to the jury. It is true that the evidence was in sharp conflict, but since the plaintiff's evidence was substantial, this factor is irrelevant.[1] It is peculiarly within the jury's province to resolve evidentiary conflicts and to decide upon the credibility of witnesses. I think the Court today in holding that there was no abuse of discretion without basing its decision upon a lack of evidence or upon some fatal weakness in the evidence on behalf of the plaintiff clearly departs from the teaching of *Duncan* and deprives the plaintiff of a verdict to which he was rightfully entitled. I would, therefore, vacate, the judgment for defendant and remand the action for reinstatement of the original verdict and judgment.

[fol. 7]

I do agree with the comments in the majority's opinion concerning the impermissible practice of interrogating the members of the jury to ascertain their reasons for

[1] One cannot read the testimony of the witnesses examined by the plaintiff, Hal Newman, Paul H. Fortenberry, John D. Faulkner, Theodore L. Tillson, Theodore H. Fortenberry, Robert L. Bane and Mrs. Henry Fortenberry, without finding substantial and material evidence supporting the plaintiff's case. The testimony of the five witnesses offered in behalf of the defendant merely developed conflicting factual issues, which should have been left to the jury to resolve.

reaching their verdict. However, in this case since the Court in its formal ruling granting a new trial, made specific reference to this interrogation, pointing out that "it was evident that a number of the jurors was not convinced that the evidence supported plaintiff's theory," I think we must conclude that at least in part the conclusion of the district judge to set the jury's verdict aside was based upon the responses which he improperly received from the jurors.

APPENDIX B

NOS. 17,042, 17,043

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

MRS. T. H. DUNCAN (C. W. Duncan, Administrator of the Estate of MR. T. H. DUNCAN, Deceased),
Plaintiff-Appellee,

v.

W. RAY DUNCAN,
Defendant-Appellant.

MRS. JOHN FAIN,
Plaintiff-Appellee,

v.

W. RAY DUNCAN,
Defendant-Appellant.

May 4, 1967

Before O'SULLIVAN, PECK, and McCREE, CIRCUIT JUDGES.

PECK, Circuit Judge.

Appendix B

These consolidated cases arose out of a single-car accident in Lawrence County, Tennessee. The plaintiffs, defendant's mother and mother-in-law, were passengers in defendant's car when it struck a bridge abutment. Personal injury actions were commenced in a Tennessee state court and were subsequently removed to the United States District Court for the Middle District of Tennessee.

The cases were tried to a jury and a verdict finding defendant not guilty of negligence was returned. Upon plaintiffs' motion, the District Court set aside the verdicts and granted a new trial. Defendant's appeal from the order granting a new trial was dismissed by this court in 1964 for want of a final judgment, and after a second trial in which the jury returned verdicts in favor of the plaintiffs, defendant again appeals.

Several points have been raised on appeal, the principal one of which relates to the granting of the new trial. Appellant contends that the district judge acted under a mistake of law, in that he considered the case as a thirteenth juror under the inapplicable Tennessee practice. Appellant further claims that the district judge exceeded, or abused his discretion in granting the new trial to the extent that he applied an improper legal standard. In support of this contention, appellant apparently relies on statements made by the district judge when ruling on the motion for a new trial.

A brief summary of the facts as developed at the first trial would here be appropriate. Plaintiffs, both residents of Hohenwald, Tennessee, had finished a week-long visit with defendant and his wife in Alabama, and were returning home with defendant and his wife in defendant's car when the accident in question occurred. At approximately 11:00 a.m. on April 26, 1960, and approximately

180 miles from defendant's home, the car in which the four persons were ridding went out of control and skidded into a bridge abutment on the left-hand side of the road. Although the case was presented to the jury on the theory of defendant's negligence, there is no evidence explaining why the vehicle went out of control. The only eyewitnesses to the accident were the passengers in the car, and one of these passengers, Mrs. T. H. Duncan (a plaintiff) died prior to the first trial from causes unrelated to the accident.

The first witness to testify at trial was Mrs. Fain, a plaintiff, who at the time of trial was 91 years old. Mrs. Fain testified that she was sitting on the back seat of the car; that defendant was driving the automobile at the time of the accident and that in going through Lawrenceburg on the way to Hohenwald, the former town being about eight miles from the scene of the accident, it was raining some. Her version of how the accident happened was that "As we was—As Ray drove upon the bridge, why, the crash come." Again on cross-examination, the question was asked: "I believe you said—if I did not misunderstand you—when questioned by [your attorney] that the accident happened just in a flash, that the first thing you knew, it happened and hit the bridge, and that is all you know about the accident?" This witness replied, "That's all I know."

On direct examination, Mrs. Fain stated that the speed of the automobile was "maybe sixty, sixty-five, or something like that." However, this plaintiff also conceded that her husband had never owned a car, that she had never driven one, and that she had no idea how to estimate the speed of an automobile. Finally, this plaintiff admitted that she didn't remember complaining to defendant

about the manner or method in which he was operating the car, and when asked if she heard anyone else comment on that subject, she shook her head negatively.

The next witness was defendant's wife, Mrs. Lucille Duncan. Mrs. Duncan testified that defendant was driving when they startedthe trip, and drove from Tuscaloosa, Alabama, to Florence Alabama; that she drove from Florence to Lawrenceburg, Tennessee; and that defendant drove from Lawrenceburg until the time of the crash. She further stated that near Lawrenceburg, she had asked defendant if he would drive because it had begun to rain, and she didn't like to drive in the rain. According to Mrs. Duncan, the extent of the rain was "just showers." When asked how the accident happened, this witness testified "Well, I remember—I think I was looking down in the car because I don't remember seeing the bridge, but I remember seeing my husband raise his foot [from the accelerator] and then the car began to slide." With respect to the speed of the car prior to the accident, Mrs. Duncan stated that "We had been driving about 60 to 65 all the way, and [defendant] hadn't slowed up very much."

On cross-examination, Lucille Duncan was asked whether she had, on the day of the accident, told one Claude Miles (the first arrival on the scene), the patrolman who responded to the scene, and the ambulance driver that she and not defendant had been driving the automobile at the time of the crash. Her respective answers were "I never told anyone I was driving the car," and twice "I never told anyone." All three of these witnesses, called on defendant's behalf, testified that Mrs. Duncan had stated that she had been driving at the time of the accident; both the ambulance driver and Miles recalled that Mrs. Duncan had stated that defendant was

asleep when the car struck the abutment and both Miles and the patrolman testified that Mrs. Duncan had stated that she was driving at approximately 50 miles per hour when the crash occurred.

The patrolman further testified that the speed limit on the stretch of road near the point of the accident was 65 miles per hour; that this stretch of road was dangerous; and that there were danger signs and "Slippery When Wet" signs posted along the road, although the exact location of these signs was not established, and with respect to the last mentioned type of sign, this witness volunteered that he didn't know "whether the driver had access to see it or not."

Defendant did not take the stand and testify.

After the court's charge the jury returned with a verdict finding defendant "not guilty of negligence in the case." Plaintiffs set forth four grounds in the motion for a new trial, one of which was that the jury's verdict was clearly against the weight of the evidence.* At the conclusion of the oral argument on the motion the trial judge stated from the bench:

> "But I am not too happy with the verdict in view of the evidence in the case. It impressed me during this trial that there was almost overwhelming evidence of negligence on the part of the driver. In fact, I was quite surprised when the verdict came in as it did because I thought there was evidence of negligence.
>
> "I am dissatisfied with the verdict. I think it is against the weight of the evidence, and I set the verdict aside and order a new trial in these cases on that ground."

*The three other grounds set forth by plaintiffs in the motion for a new trial, which grounds ostensibly were not the basis of the District Court's order sustaining the motion, have here been considered and found to be lacking in merit.

The order sustaining the motion followed.

[1-5] In ruling upon a motion for a new trial based on the ground that the verdict is against the weight of the evidence, a district judge must compare the opposing proofs and weigh the evidence (Felton v. Spiro, 78 F. 576 (6th Cir. 1897) (Taft, J.), General American Life Ins. Co. v. Central Nat'l Bank, 135 F.2d 821 (6th Cir. 1943)), and "it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence * * *." Aetna Cas. & Surety Co. v. Yeatts, 122 F.2d 350, 352 (4th Cir. 1941), cited with approval in Turner v. United States, 229 F.2d 944, 946 (6th Cir.), cert. denied, 351 U.S. 970, 76 S. Ct. 1038, 100 L. Ed. 1489 (1956). The power of the trial judge to set aside a verdict as against the weight of the evidence and grant a new trial is thus a check or limitation on the jury's power to render a final and binding verdict, to the end that a miscarriage of justice does not result. However, "[c]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." Tennant v. Peoria & P. U. Ry. Co., 321 U.S. 29, 26, 64 S. Ct. 409, 412, 488 L. Ed. 520 (1944), Werthan Bag Corp. v. Agnew, 202 F.2d 119, 122 (6th Cir. 1953). Thus, while the district judge has a duty to intervene in appropriate cases, the jury's verdict should be accepted if it is one which could reasonably have been reached. In applying these two broad principles defining the permissible limits of court action in granting a new trial on the weight of the evidence, the district judge must, as is generally stated, exercise his sound judicial discretion. See Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251, 61 S. Ct. 189, 85 L. Ed.

147 (1940); Devine v. Patteson, 242 F.2d 828 (6th Cir.), cert. denied, 355 U.S. 821, 78 S. Ct. 27, 2 L. Ed. 2d 36 (1957) and cases cited infra. See generally 4 Moore, Federal Practice, ¶ 59.08 [5] 2d ed. 1953).

[6] Although an order granting a new trial is generally not appealable, it is clear that such orders are reviewable on appeal from the final judgment is the second trial. See North Texas Producers Association v. Metzger Dairies, Inc. 348 F.2d 189 (5th Cir. 1965), cert. denied, 382 U.S. 977, 86 S. Ct. 545, 15 L. Ed. 2d 468 (1966). Indeed, the order dismissing defendant's prior premature appeal stated that "the correctness of the District Court's order would be reviewable, of course, upon an appeal from the final judgment disposing of the case," citing Ford Motor Co. v. Busam Motor Sales, Inc., 185 F.2d 531 (6th Cir. 1950).

[7] With respect to the applicable scope of review of a District Court decision granting or denying a new trial on the basis of the weight of the evidence, it is well settled that reversal may be predicated only upon an abuse of discretion. Cutter v. Cincinnati Union Terminal, 361 F.2d 637 (6th Cir. 1966); Southern R.R. Co. v. Miller, 285 F.2d 202, 85 A.L.R.2d 842 (6th Cir. 1960); accord, Mooney v. Henderson Portion Pack Co., Inc., 339 F.2d 64 (6th Cir. 1964); Werthan Bag Corp. v. Agnew, 202 F.2d 119 (6th Cir. 1953); Spero-Nelson v. Brown, 175 F.2d 86 (6th Cir. 1949). Cf. Trice v. Commercial Union Assur. Co., 334 F.2d 673 (6th Cir. 1964), cert. denied, 380 U.S. 915, 85 S. Ct. 895, 13 L. Ed. 2d 801 (1965) ("clear abuse of discretion"); Turner v. United States, 229 F.2d 944 (6th Cir. 1956); Hunt v. Standard Brands, Inc., 72 F.2d 822 (6th Cir. 1934).

Appendix B

There are few cases where an appellate court has reversed a decision of a district court in either granting or denying a motion for a new trial based on the ground that the verdict was against the weight of the evidence. There is not, however, a complete lack of precedent for such action.

In Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Cir. 1965), cert. denied, 382 U.S. 983, 86 S. Ct. 559, 15 L. Ed. 2d 472 (1966), following the crash of one of defendant's planes, an action was brought for the wrongful death of one of the passengers. The flight was international and thus liability, if established, was limited to $8,291.87 by the Warsaw Convention, unless the defendant was guilty of "wilful misconduct." The jury returned a verdict for defendant on all issues and the District Court granted plaintiff's motion for judgment n.o.v. as to liability, holding that the evidence established "wilful misconduct" as a matter of law. The district judge thus granted a new trial on the issue of damages, and also granted a conditional new trial on all issues should the judgment be reversed.

The Court of Appeals reversed the judgment in favor of plaintiff, stating:

> "We cannot even say that the pilot's or the airline's negligence was established as a matter of law, much less wilful misconduct. Once the case went to the jury, its verdict should not have been upset, if reasonable men could find in defendant's favor, as they certainly could here," Id. 346 F.2d at 538.

In reviewing and reversing the conditional grant of a new trial on all issues, based on the ground that the verdict was against the weight of the evidence, the court stated:

"We have already held that there was sufficient evidence to go to the jury. * * * To order a new trial on the asserted ground when there was sufficient evidence to go to the jury need not be an abuse of discretion in every case, see 6 Moore, Federal Practice ¶ 59.08 [5], at 3817, 3820 (2d ed. 1953), but we find it was in this case. In light of the possible inferences as to what actually happened when the pilot began his letdown, we cannot agree that, viewed in light of the proper standard, the verdict could be called against the weight of the evidence."

The court then reinstated the original verdict in favor of defendant and set aside the judgment entered upon the second jury's determination of $924,396 damages.

In Lind v. Schenley Industries, Inc., 278 F.2d 79 (3d Cir.) (En banc), cert. denied, 364 U.S. 835, 81 S. Ct. 58, 5 L. Ed. 2d 60 (1960), a case procedurally similar to *Berner*, the jury returned a verdict in favor of plaintiff, and the district judge entered judgment n.o.v. for defendant, and conditionally granted a new trial in the event the judgment was reversed. On appeal the court reversed the judgment and proceeded to review the order granting a new trial. The first ground specified in support of this order, that the verdict was contrary to law, had been disposed of by the ruling on the judgment; the second ground, that the verdict was the result of error in the admission of evidence, was decided in plaintiff's favor. With respect to the one remaining ground, that the verdict was contrary to the weight of the evidence, the court noted:

"New trials granted because (1) a jury verdict is against the weight of the evidence may be sharply distinguished from (2) new trials ordered for other reasons: for ex-

ample, evidence improperly admitted, prejudicial statements by counsel, an improper charge to the jury or newly discovered evidence. In the first instance given it is the jury itself which fails properly to perform the functions confided to it by law. In the latter instances something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible.

* * *

"[W]here no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial.

"Where a trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of jurors a verdict should be scrutinized more closely

by the trial judge than is necessary where the litigation deals with material which is familiar and simple, the evidence relating to ordinary commercial practices."

The court concluded that the district judge had substituted his judgment for that of the jury, thereby abusing his discretion, and the case was remanded back with instructions that the original verdict and judgment be reinstated.

The court in Fassbinder v. Pennsylvania R.R. Co., 322 F.2d 859 (3d Cir. 1963) (En banc), held that the district judge had erred in failing to give effect to the inference of negligence warranted by the doctrine of *res ipsa loquitur*, and as a consequence had usurped the function of the jury. And in Georgia-Pacific Corp. v. United States, 264 F.2d 161 (5th Cir. 1959), the court held the District Court's refusal to grant a new trial to be a clear abuse of discretion where the verdict was found to lack evidentiary support. See also Charles v. Norfolk & Western Ry. Co., 188 F.2d 691 (7th Cir.), cert. denied, 342 U.S. 831, 72 S. Ct. 55, 96 L. Ed. 628 (1951).

[8, 9] Appellant further contends that "in setting aside the verdict on the basis of his dissatisfaction with it, [the district judge] lapsed into the inapplicable Tennessee practice, considered himself as a thirteenth juror and [thereby] committed a palpable error. * * *" Appellant seems to argue that isolated statements made by the district judge support this conclusion, but they may not properly be so viewed. Rather, those statements may only be considered in context and after having had due regard for the entire record, including particularly the evidence adduced at the first trial. Although a determination of this contention is not essential to the conclusion herein announced, it is observed that the argument is not supported by the record.

[10-12] Defendant's evaluation of the subject matter of this case as a "prime example of subject matter lying well within the comprehension of jurors" is deemed accurate. The first trial lasted less than two days, and there has been no showing that the jury considered any matter not properly before it. Moreover, plaintiffs' case of negligence against defendant could not be characterized as strong and it is clear that the credibility of plaintiffs' witnesses was in issue. In this respect it must be remembered that, as the court correctly charged the jury, the burden of proof in establishing negligence was on plaintiffs. The jury was not required to impose liability on defendant on the basis of the testimony of his wife and aged mother-in-law, and the jury's verdict in the first trial was, at the very least, a reasonable one. Therefore, on the basis of this record, it cannot be said that the District Court did not clearly abuse its discretion in granting plaintiffs a new trial on the ground that the verdict was against the weight of the evidence.

[13, 14] The fact that the second jury which heard the case returned a verdict in favor of plaintiffs, thus "reinforcing" the decision of the district judge that the verdict for defendant was against the weight of the evidence, is of no significance here. See Fassbinder v. Pennsylvania R.R. Co., supra. Even the most inexperienced attorney is aware of the fact that the outcome of any given case depends in large part upon the particular jury hearing it. As was stated in American Mfgrs. Mut. Ins. Co. v. Wilson-Keith & Co., 247 F.2d 249, 256 (8th Cir. 1957), there was reference to an alleged error of law, "regardless of the different results in the trials, the function of this court is to review alleged errors and if [a party litigant] had become, in due course, vested with a valid judgment, they are entitled to have the action

of the trial court which divested them of it reviewed for the alleged manifest error * * *."

For the foregoing reasons, the judgment in favor of plaintiffs is vacated, the order granting plaintiffs a new trial is reversed and the case is remanded back with instructions that the verdict and judgment in defendant's favor be reinstated.

Supreme Court, U. S.
SEP 15 1972
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

NO. 72-277

HENRY C. FORTENBERRY, Father of
GARY C. FORTENBERRY, Deceased,
Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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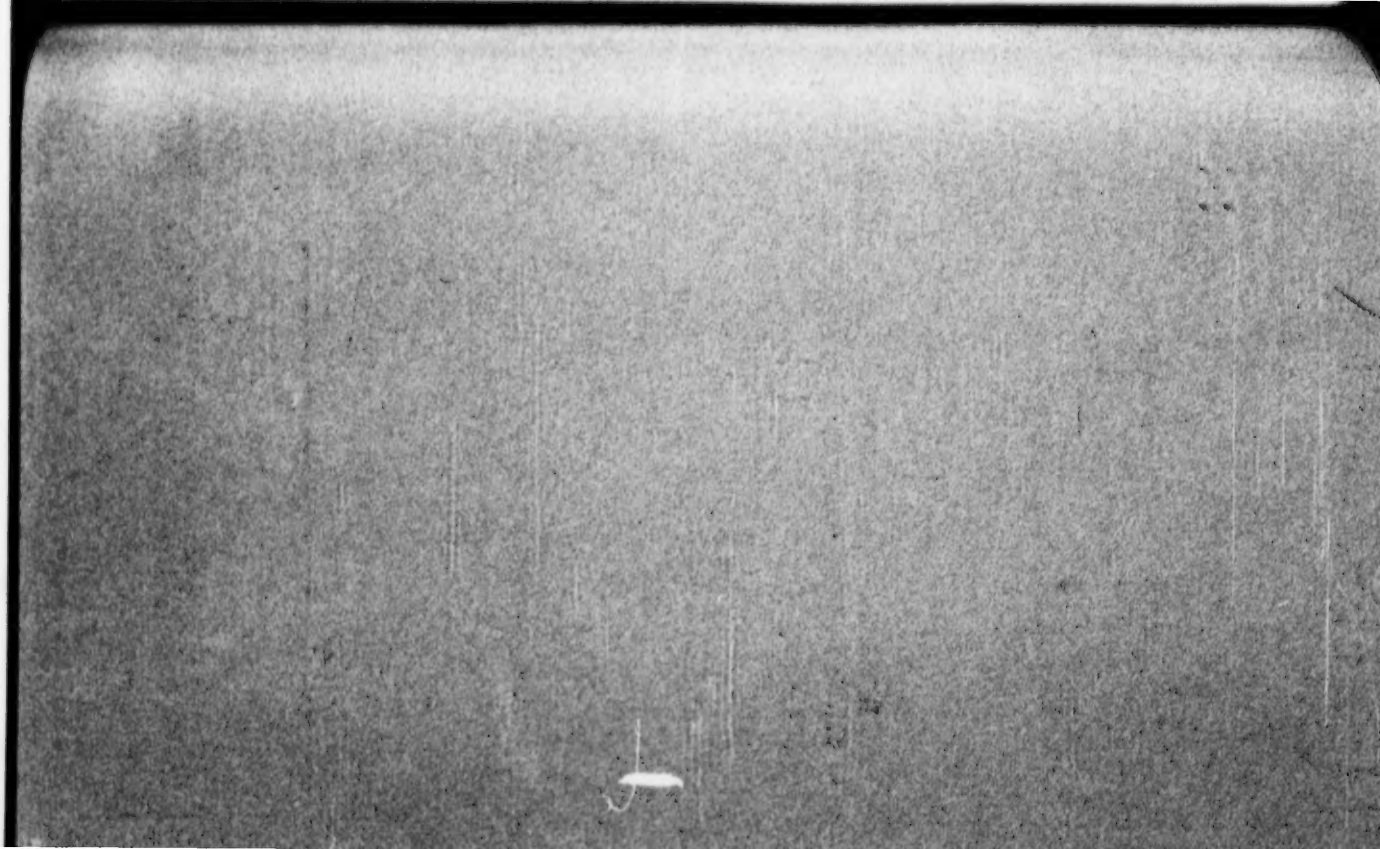

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America

Your respondent, the New York Life Insurance Company, respectfully represents to this Honorable Court the following:

STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

The respondent does not agree with the Statement of Issue as presented by the petitioner and therefore submits the following question as the issue presented for review:

DID THE DISTRICT JUDGE ABUSE HIS DISCRETION IN GRANTING THE RESPONDENT A NEW TRIAL?

THE RESPONDENT CONTENDS THE ANSWER SHOULD BE "NO."

STATEMENT OF THE CASE

This is an action based on a contract entered into between respondent, New York Life Insurance Company, and the deceased son of the petitioner, Henry C. Fortenberry. The policy of insurance provided for $32,679.00 in life insurance and further provided that if the insured's death resulted directly, and independently from all other causes, from accidental bodily injury, the respondent would pay an additional sum of $32,679.00. The wife of the insured was the designated and named first beneficiary of said policy. The petitioner, Henry C. Fortenberry, father of the insured, was the designated and named second beneficiary of said policy. Following the untimely death of the insured in an automobile accident in June, 1969, the respondent paid the face amount of the policy with accidental death benefits to the named first beneficiary, the insured's wife, Lois Elaine Simpson Fortenberry, who filed the only claim for the policy benefits with the respondent.

Petitioner filed a suit alleging a change in beneficiary, and the case was tried before a District Judge and a jury. At the close of petitioner's proof respondent moved the Court for a directed verdict, which motion was overruled. The respondent renewed its motion for a directed verdict at the close of all the proof, which motion was again overruled. The case was submitted to the jury, whereupon the jury returned a verdict in favor of the petitioner. Respondent timely filed its motion for judgment notwithstanding

the verdict or in the alternative for a new trial, as amended. The District Judge overruled the motion for a judgment notwithstanding the verdict, but granted respondent's motion for a new trial, whereupon a second trial was held and a verdict was rendered by the jury for the respondent. Petitioner only appealed the decision of the District Judge in granting respondent a new trial. The Sixth Circuit Court of Appeals affirmed the action of the District Judge in granting a new trial.

ARGUMENT

The respondent respectfully submits that the petition for writ of certiorari should be denied for the following reasons:

I

The District Judge did not abuse his discretion in granting respondent a new trial, and the Sixth Circuit Court of Appeals was correct in affirming the decision of the District Judge.

Petitioner relies heavily on the case of *Duncan v. Duncan*, Appendix B, in his petition for writ of certiorari, 377 F.2d 49 (1967), in support of his argument that a District Judge in Tennessee is strictly limited in his authority to grant a new trial, whereas the respondent takes the position that the District Judge has a wider latitude in this area, and that the basic test is whether or not there has been an abuse of discretion on the part of the District Judge. In support of its position respondent relies on the following cases:

Felton v. Spiro, 78 Fed. Rep. 576 (6th Cir., 1897).
Cross v. Thompson, 298 F.2d 186 (6th Cir., 1962).

Mooney v. Henderson Portion Pack Co., 339 F.2d 64 (6th Cir., 1964). *Cutter v. Cinn. Union Terminal Co.*, 361 F.2d 637, (6th Cir., 1966). *Hopkins v. Coen*, 431 F.2d 1055 (6th Cir., 1970).

Although the *Spiro* case, *supra*, contained the word "overwhelming" weight of the evidence, the other cases cited above, and many others from the various circuits, seem to hold that it does not require "overwhelming" weight. As an example, in the case of *United States v. Bucon Const. Co.*, 430 F.2d 420, at page 423, the 5th Circuit used this language:

> "In passing on a motion for a new trial the Court may and should exercise a sound discretion, and its ruling thereon will not be reviewed in an Appellate Court in the absence of a clear abuse of discretion."
>
> "A Trial Judge, on a motion for a new trial may set aside a verdict and grant a new trial, if in his opinion the verdict is against the clear weight of the evidence * * * or will result in a miscarriage of justice even though there may have been substantial evidence which would prevent the direction of a verdict."

In 1941 the Fourth Circuit, speaking through Judge Parker, in the case of *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, laid down the following rules with respect to the question here involved in this language:

> "Under Federal rule, it is the duty of the District Judge on motion therefor to set aside verdict and grant a new trial, if Judge is of opinion that verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict."

At Page 354, the Court stated as follows:

"To the Federal Trial Judge, the law gave ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so required."

Also on Page 354, the following language appears:

"It is equally well settled, however, that the granting or refusing of a new trial is a matter resting in the sound discretion of the Trial Judge, and that his action thereon is not reviewable upon appeal, save in the most exceptional circumstances."

In the Fifth Circuit, *United States of America v. 1160.96 Acres of Land, Holmes Co. Miss.*, reported in 432 F.2d 910, at page 915, the following language is used:

"A motion for new trial is addressed to the Trial Judge's discretion. He may grant a new trial if he thinks he has committed error; and he may grant one (and he alone can) because he thinks the verdict is wrong, though supported by some evidence. The exercise of his discretion is not ordinarily reviewable on appeal, though a failure to exercise discretion, or an abuse of it, may be corrected."

In the case under consideration, it was obvious that at least five of the jurors did not think the plaintiff had proved his case. We cannot conceive of a circumstance more compelling upon a District Judge to grant a new trial in the interest of justice than that which occurred in this case.

It would appear most appropriate to compare the language of the District Judge in the case under consideration with that of the District Judge in *Duncan v. Duncan, supra.*

In the present case the District Judge in granting the motion for a new trial used the following language:

> "The Court is not satisfied with the verdict; that is to say, it is not satisfied that the evidence supports the verdict."

whereas, in *Duncan v. Duncan*, *supra*, the District Judge stated in granting a new trial as follows:

> "But I am not too happy with the verdict in view of the evidence in the case. It impressed me during this trial that there was almost overwhelming evidence of negligence on the part of the driver. In fact, I was quite surprised when the verdict came in as it did because I thought there was evidence of negligence.
>
> "I am dissatisfied with the verdict. I think it is against the weight of the evidence, and I set the verdict aside and order a new trial in these cases on that ground."

Respondent respectfully submits that there is obviously a vast difference in the language used by the District Judges in the respective cases. In *Duncan v. Duncan* the District Judge expressed the opinion that there was evidence of negligence contrary to the jury's finding and stated further that he was of the opinion that the verdict was against the weight of the evidence, and, as respondent understands the law, a District Judge is not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn inferences or conclusions or because Judges feel that other results are more reasonable. *Duncan v. Duncan*, *supra*.

In the present case the District Judge found that the verdict was not supported by the evidence, and surely this finding cannot constitute an abuse of his discretion,

and upon reaching such a conclusion, he is bound to grant a new trial. Or, to state it differently, it is fundamental that any verdict if it is valid must be supported by the evidence.

It is interesting to note that Judge Peck was the author of the opinion in *Duncan v. Duncan*, *supra*, and that Judge Peck was on the panel which decided the case under consideration and participated in the majority opinion therein.

II

The respondent respectfully submits that the District Judge did not abuse his discretion in granting respondent a new trial because the evidence introduced at the trial did not approach the legal requirement to effect a change of beneficiary on a life insurance policy where surrender of the policy to the insurance company is not required.

Under the authorities in Tennessee the beneficiary of an insurance policy may be effectively changed if the insured substantially complies with the provisions of a policy providing for such a change in beneficiary. Mere unexecuted intention of the insured to change beneficiary is not substantial compliance with policy provisions for changing a beneficiary. Where consent of the insurance company is not required to change the name of the beneficiary in the policy, the announced intention of the insured to change the beneficiary is not alone sufficient to effect the change. In order to effect a change of beneficiary, the insured must not only declare his intention to change the beneficiary, but he must do everything he can to effect the change. This language and its meaning is clearly established by the following Tennessee cases:

Davis v. Davis, (1916) 136 Tenn. 520; 190 S.W. 459; *Cronbach v. Aetna Life Ins. Co.*, (1925) 153 Tenn. 362,

284 S.W. 72; *Holmes v. Gooch, Met. Life Ins. Co.*, (1926) 3 Tenn. App. 80; *Holmes v. Interstate Life Ins. Co.*, (1946) 29 Tenn. App. 482, 197 S.W.2d 551; *Mutual Savings Life Ins. Co. v. Cowan*, (1960) 188 F. Supp. 148 (E.D. Tenn.); *Rep. Natl. Life Ins. Co. v. Sackmann*, (1963) 324 F.2d 756 (E.D. Tenn. 6th Cir.); *Cooper v. United States*, (1965) 340 F.2d 845 (E.D. Tenn. 6th Cir.)

The evidence introduced in this case at the trial simply did not approach this legal requirement. The proof, if given its most favorable construction in favor of the petitioner, merely shows that the insured did nothing more than express an intent to change the beneficiary. Upon the trial of the case there were many objections on the admissibility of testimony made by the respondent, and the District Judge permitted the introduction of a considerable amount of such testimony over the objection of the respondent with the explanation to the jury that it was being admitted for the sole purpose of showing the intent to change the beneficiary. Leaving aside the question of whether or not such testimony should have been allowed, the evidence introduced by the petitioner at the trial attempted to show the insured desperately trying to effect a change of beneficiary on his insurance policy before he was suddenly killed in an untimely automobile accident in Georgia while on a bowling trip.

The failure of this picture to materialize is clearly exhibited through the testimony of various witnesses covering a period of a week to ten days, when allegedly the insured would hang up the telephone and announce he was going that moment to the insurance company to sign a change of beneficiary form. If the insured had done this the first time he made the announcement, there would certainly have been no reason to make such further an-

nouncements. It is obvious according to the evidence introduced by the petitioner at the trial that the insured was making this threat virtually every day, and as the evidence clearly shows, the insured at no time carried through with any such declarations. The only possible one which he could have carried through would have been the last one which was in no stronger language or under any different circumstances than the first one.

It is obvious from a reading of this record that the insured knew that he had to take some action other than to only express an intention to change his beneficiary, and the record is entirely silent with respect to any such act or acts having ever been taken by the insured. In the absence of some evidence showing an overt act by the insured to effectuate his intent to change the beneficiary, the District Judge was clearly justified in granting the respondent a new trial.

III

Respondent respectfully submits that it has serious doubt as to whether this is a proper case for consideration by this Honorable Court under the guidelines of Rule 19, Supreme Court Rules. There do not appear to be any special and important reasons for granting the writ of certiorari in this case. No Federal question of substance not heretofore covered by this Court is involved in this case. There is not any conflict between the Circuit Courts of Appeal on the applicable rule of law to be applied in determining if a District Judge has abused his discretion in granting a new trial. Furthermore, there appears to be no conflict between the Circuit Courts regarding the applicable rule of law to be applied when a change of beneficiary on an insurance policy is perfected, where the surrender of the policy is not required.

Petitioner states in his petition that the opinion herein sought to be reviewed is in direct conflict with the opinion rendered in United States Court of Appeals, 5th Circuit, in the case of *O'Neil v. W. R. Grace & Co.*, 410 F.2d 909 (1969). The respondent submits that the opinion herein sought to be reviewed is not in conflict with *O'Neil v. W. R. Grace & Co.* Respondent says simply that the case of *O'Neil v. W. R. Grace & Co.*, was concerned with the standard to be followed in ruling upon a motion for a judgment notwithstanding the verdict. Such standard is not applicable in the case under consideration.

CONCLUSION

The respondent therefore respectfully submits that the writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent.

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IN THE

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October Term, 1972

NO. 72-277

HENRY C. FORTENBERRY, father of
GARY C. FORTENBERRY, deceased,
Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

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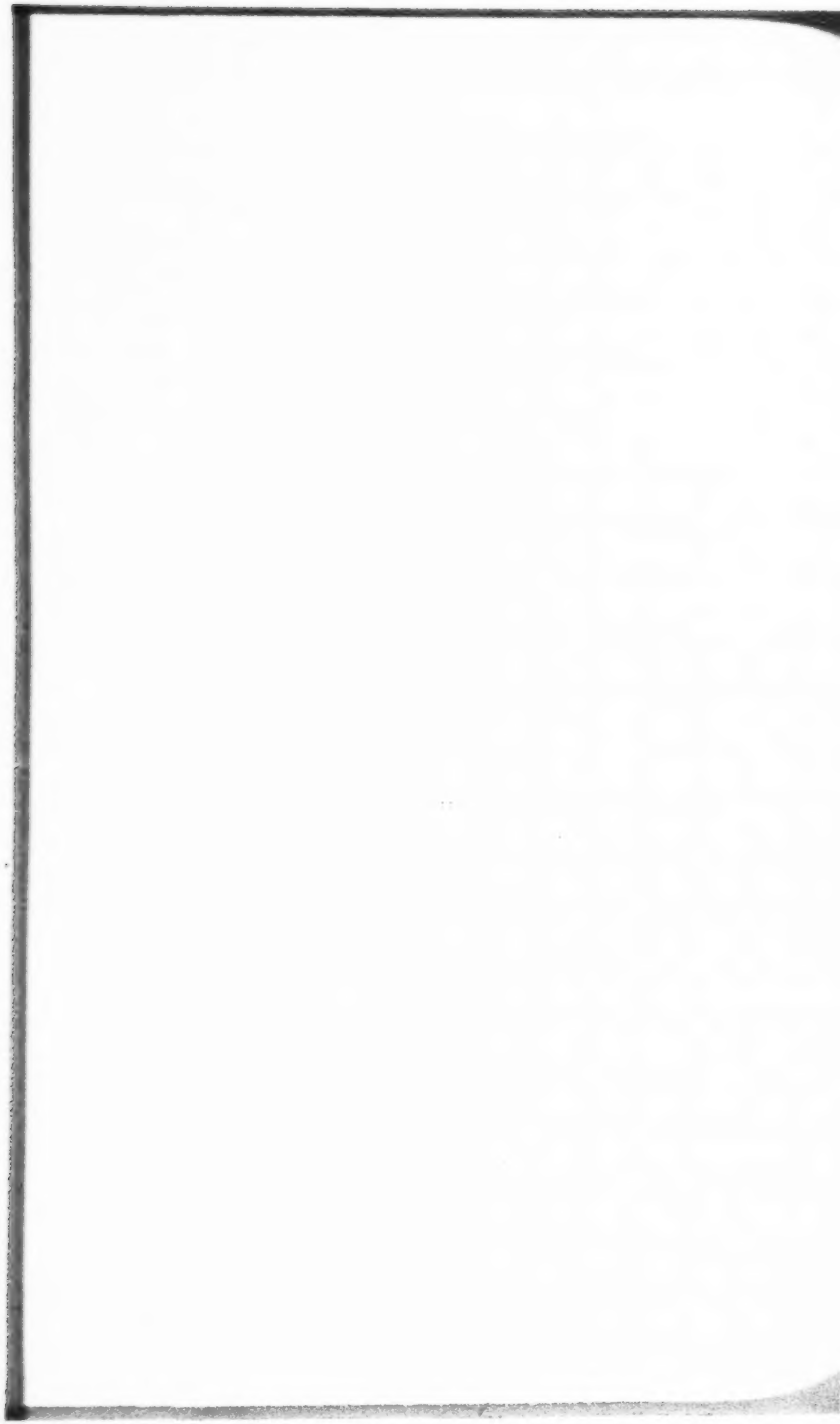

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

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GARY C. FORTENBERRY, Deceased,
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v.

NEW YORK LIFE INSURANCE COMPANY
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Comes, the Petitioner, HENRY C. FORTENBERRY, father of GARY C. FORTENBERRY, Deceased, by and through his attorney, Peter L. Niles, and respectfully moves this Honorable Court for Leave to File Petition for Rehearing in this cause.

Petitioner would show to the Court in support of its Motion for Leave to File Petition for Rehearing that a Petition of Certiorari was heretofore filed and this Court,

on November 6th, 1972, entered an Order Denying the Petition for Writ of Certiorari in this case.

That Petitioner's attorney was outside of the City of Daytona Beach, Florida from December 1, 1972, by reason of his marriage in Atlanta, Georgia and was outside the country, until December 30th, 1972 on a honeymoon and that because of Petitioner's attorney being outside the country, did not have an opportunity to file a Petition for Rehearing in this Cause.

Petitioner would further show to the Court that Petitioner's Motion for Rehearing is premised upon a decision of the District Court of Appeals for the Eighth Circuit which was rendered October 16, 1972 and not reported until November 13, 1972, approximately one week after this Honorable Court's decision on Petitioner's Petition for Certiorari and Petitioner would show the Court that this decision materially effects Petitioner's cause and did not come to Petitioner's attention until after Petitioner's attorney returned to the Country on December 30th.

WHEREFORE, Petitioner respectfully prays that this Court will grant Petitioner's Motion for Leave to File this Petition for Rehearing.

Respectfully submitted,

PETER L. NILES,
Attorney for Petitioner

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October Term, 1972

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NEW YORK LIFE INSURANCE COMPANY,
Respondent.

APPENDIX TO PETITION FOR REHEARING

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[466 F.2d 179 (1972)]

FIREMAN'S FUND INSURANCE COMPANY,
a Corporation, et al.,
Appellants,

v.

AALCO WRECKING COMPANY, INC.,
a Corporation,
Appellee.

No. 20552.

United States Court of Appeals,
Eighth Circuit.

Submitted Oct. 18, 1971.

Decided Aug. 7, 1972.

Rehearing and Rehearing En Banc
Denied Sept. 26, 1972.

Dissenting Opinion from Denial of
Rehearing En Banc
Oct. 16, 1972.

Dale I. Larson, Adolph K. Schwartz, Hullverson, Richardson & Hullverson, St. Louis, and Robins, Davis & Lyons, Minneapolis, Minn., for appellants.

Edward D. Weakley, Boyle, Priest, Elliott & Weakley, Howard Elliott, St. Louis, Mo., for appellee.

Before LAY, HEANEY and STEPHENSON, Circuit Judges.

466 F.2d 179 (1972)

LAY, Circuit Judge.

Plaintiff insurance companies initiated this subrogation action to recover the damages to their assureds arising from a fire loss at the Shapleigh Warehouse Complex in St. Louis, Missouri, on August 4, 1965. Plaintiffs received a jury verdict against the defendant, Aalco Wrecking Company, Inc., who was engaged in demolition work at the complex; however, on post trial motions the district court granted defendant's motion for judgment n.o.v. and alternatively under Federal Rule of Civil Procedure 50(c) defendant's motion for new trial. Plaintiffs now appeal this judgment. We reverse with direction to enter judgment for the plaintiffs in accordance with the original verdict.

In August 1965 the defendant Aalco conducted demolition work on a group of buildings in downtown St. Louis. In the early morning hours of August 4, 1965, a blaze was discovered in the buildings. At the time of discovery the fire had reached three to five alarm proportions. Soon after the fire department arrived the fire spread out of control damaging the assureds' personal property which was stored in an adjacent building. The cause of the fire was unknown. Plaintiffs claim that the delay in the detection of the fire caused the extensive destruction and resulted from defendant's failure to have a watchman on the premises. Plaintiffs assert that the defendant did not and could not secure the demolition site from intruders and did not maintain a watchman at the site to protect the buildings and notify the fire department of any fires.

The trial court submitted the case to the jury under the following instructions:

"Your verdict must be for the plaintiffs if you believe:

First, a fire started in the area being demolished by the defendant and spread to adjacent property, including that occupied by the insured tenants mentioned in evidence, and

Second, the buildings being demolished by defendant were not secured against transients or vandals and it was not reasonably possible to do so, and defendant provided no watchman while the demolition was not in progress, and

Third, defendant's failure to employ a watchman was negligence, and

Fourth, as a direct result of such negligence there was a delay in discovering and reporting the fire to the fire department, and

Fifth, as a direct result of such delay the fire spread to property occupied by the tenants and caused damages to them and losses to the plaintiffs."

[1] We find substantial evidence to sustain the jury's finding of negligence and proximate cause arising from defendant's failure to employ a watchman.

Although there was conflicting testimony, substantial evidence was presented to establish that at the time the fire was originally discovered it was burning in the area demolished by the defendant, and from there it spread to the adjacent property.

Considerable evidence was offered to prove that defendant did not and could not secure the buildings being razed and that defendant had not employed a watchman. The Building Code of the City of St. Louis §2116.2(9) provides:

"All buildings to be razed three stories in height or greater shall be kept secure against entry of transients or vandals. If security is not possible, watchman shall be provided during the hours wrecking is not being accomplished."

Defendant's witnesses agreed that *if* the buildings could be secured, there was no need for a watchman on the demolition site. Implicit in this testimony was the premise that if the buildings were not secure, it was customary within the construction trade in St. Louis to provide a watchman. Thus, one of the focal issues turned on the factual question whether the buildings could be made secure. On the basis of the record presented this court cannot say substantial evidence did not exist to support the jury's finding as to the lack of security in the building complex.

Captain Klein of the St. Louis fire department visited the demolition site on August 3, 1965, the evening before the fire. His testimony reads:

"A. No, I don't recall a single instance where we had to force a door or anything else. Most of the times the doors were hanging open, and we just walked right through.

"Q. Did you normally walk through the buildings?

"A. Right.

"Q. On the evening of August 3, 1965, did you have occasion to observe whether the fire doors, many of which are exposed and showing as little brown cardboard spots on this model, were open or closed?

"A. I'd say for the most part they were either open or gone entirely.

"Q. All right, sir. Now, in prior visits when you went into the building, Captain, or the buildings, did

you have any difficulty gaining access to Building No. 11?

"A. None whatsoever. No, in fact, we had driven the battalion car in there and turned it around inside this building. It was large enough for a truck.

* * *

"Q. And at any time when you were in these buildings, Captain, had you had any difficulty in gaining access from one to the other?

"A. No, none whatsoever." App. at 262-263.

Several other witnesses verified that the buildings were not always secure. Even Aalco's superintendent indicated that it was impractical to secure portions of the complex.

The evidence amply supports the conclusion that there was a delay in discovering and reporting the fire. The record shows that Captain Klein estimated that the fire had been burning up to one hour before the fire department's arrival. The record also shows that there was a Potter electronic supervisory alarm line which was grounded at 2:10 a.m., twenty-one minutes before any report of the fire.[1]

[1] The Potter Electric Alarm Company had installed and was monitoring the fire sprinkler systems for the entire complex. Because of the demolition project's interference with its existing electrical cables, a temporary plastic cable was run along the sprinkler piping and spliced to the original cable in order to supervise the remaining buildings. At 2:10 a.m. on August 4, 1965, Potter recorded a "ground" signal which meant that the insulation surrounding the wire was destroyed and was touching a conductor to the ground, such as the sprinkler piping. There was no dispute that the fire caused Potter's "ground" signal, and as a result of the "ground" no alarm could be received from the sprinkler systems.

Defendant challenges plaintiffs' right to recover on the basis that defendant's failure to provide a watchman did not constitute (1) negligence or (2) the proximate cause of the plaintiffs' damage. We must disagree.

[2,3] Violation of a city ordinance under Missouri law is evidence of negligence. See Dickerson v. St. Louis Public Service Co., 365 Mo. 738, 286 S.W.2d 820, 824 (1956); Wells v. Henry W. Kuhs Realty Co., 269 S.W.2d 761, 767 (Mo. 1954). See also Cichacki v. Langton, 392 S.W.2d 397, 400 (Mo. 1965).[2] Although the ordinance was offered and received in evidence, the plaintiffs did not request an instruction on it nor did the trial court instruct the jury under it. Nevertheless, the jury could without error consider the ordinance as evidence of negligence. The failure of the court to instruct on the ordinance was not prejudicial to the defendant. Section 2116.2(a) of the Building Code of the City of St. Louis was expressly enacted, along with other sections, to require fire safety precautions and to avoid fire hazards. Plaintiffs' assureds were clearly within the class of beneficiaries whom the Code sought to protect. However, notwithstanding consideration of the ordinance, there existed sufficient

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2 Another suit arising out of this same fire loss was brought by different plaintiffs and resulted in a verdict for Aalco in the Missouri state court. See Washington University v. Aalco Wrecking Co., ...S.W.2d ... (Mo. 1971). On appeal the judgment for the defendant was affirmed. However, in January 1972 the court entertained a rehearing on the question whether violation of the Building Code provisions (including §2116.2(9)) constituted negligence per se. The plaintiffs apparently, as here, did not request an instruction on the ordinance although the ordinance was received into evidence. It is significant that the Missouri Supreme Court did not reject plaintiffs' theory of common law negligence and proximate cause which was identical to that which has been asserted here. As of this writing no decision has been rendered on the reargument.

credible testimony, including statements from the defendant's own witnesses, that it was the custom recognized in the construction trade in St. Louis to have a watchman on demolition premises unless the premises could be made secure.

[4] Under common law where a party fails to provide protection against known dangers, that failure has been held to be negligence. Cf. Imperial Oil, Ltd. v. Drlik, 234 F.2d 4 (6 Cir. 1956), cert. denied, 352 U.S. 941, 77 S.Ct. 261, 1 L.Ed.2d 236 (failure to post a watchman at the rail of a vessel to warn the ship's winch operator of danger to dock crewman from suddenly-drawn-taut mooring lines); Brumm v. Goodall, 16 Ill.App.2d 212, 147 N.E.2d 699 (1958) (failure to provide sufficient lifeguard supervision); Richardson v. Ham, 44 Cal.2d 772, 285 P.2d 269 (1955) (undue risk of harm created by an unattended bulldozer); Stoutwell v. Board of Trustees of Stanford Univ., 64 Cal. App.2d 197, 148 P.2d 405 (1944) (failure to have a sufficient number of police to protect university students); Stevens v. City of Pittsburgh, 329 Pa. 496, 198 A. 655 (1938) (lack of proper supervision of young boys firing rifles); Rovegno v. San Jose Knights of Columbus, 108 Cal.App. 591, 291 P. 848 (1930) (failure to furnish lifeguards).

[5] If an owner of property negligently allows the spread of a fire on his premises, he may be liable for injury to others even though he has no connection with the fire's origin. See Capra v. Phillips Investment Co., 302 S.W.2d 924, 928 (Mo. 1957). See also Willard v. Bethurem, 234 S.W.2d 18 (Mo.App. 1950); Steele v. Darner, 124 Mo.App. 338, 103 S.W. 582 (1907). In Reid v. Sibell, Inc. v. Gilmore & Edwards Co., 134 Cal.App.2d 60, 285 P.2d 364 (1955), the defendant was storing highly inflam-

mable liquids in its section of a building also occupied by plaintiff. The building caught fire, and plaintiff contended that the fire spread and injured plaintiff's property as a result of the combustion of the liquids stored by defendant. Plaintiff complained that defendant was negligent, not for starting the fire, but for failing to take reasonable precautions to prevent the spread of the fire since it knew that if a fire was to start, the high flammability of its stored liquids would cause the fire to readily endanger plaintiff's property. The court agreed, saying:

> "There seems no sound reason to restrict this right and its corresponding duty to acts which contribute to the origin of a fire, as distinguished from its spread. In other jurisdictions, the rule, particularly in the later cases, appears to follow the view that one is liable for acts or omissions which cause the spread of fire of whatever origin." 285 P.2d at 368.

In view of all the surrounding circumstances, we conclude that the trial court properly submitted to the jury the issue of negligence arising from the defendant's failure to furnish a watchman on the premises.

Defendant likewise challenges the submission to the jury of the question whether the failure to furnish a watchman constituted the proximate cause of the fire spreading to the property of plaintiffs' assureds. The defendant argues that it is speculative whether a watchman could have seen the fire in sufficient time to have prevented its eventual destruction.

[6] It is well settled under the law of Missouri that the causal connection between negligence and harm need not be established by direct evidence. Causation may be established by proof of facts and circumstances from

which the connection may be reasonably inferred. State ex rel. City of St. Charles v. Haid, 325 Mo. 107, 28 S.W.2d 97, 102 (1930); Phillips v. Stockman, 351 S.W.2d 464, 473 (Mo.App. 1961); Leek v. Dillard, 304 S.W.2d 60, 65 (Mo.App. 1957); Long v. F. W. Woolworth Co., 232 Mo.App. 417, 109 S.W.2d 85, 88 (1937).[3]

There were many evidential factors which the jury could have properly considered relating to the issue of proximate cause: (1) demolition premises are recognized as a highly hazardous fire area; (2) the ground wires on the fire alarm indicated the fire had burned for at least one-half hour before it was visually discovered and reported; (3) the fire was observed from three blocks away by a night watchman twenty-one minutes after the electrical alarm was grounded; (4) Captain Klein of the St. Louis fire department testified that in his opinion if the fire had been reported fifteen minutes earlier, damage to the adjoining property would have been averted; (5) the fire had been burning up to an hour before the fire department arrived and two of the buildings were completely engulfed in flames.

In Steele v. Woods, 327 S.W.2d 187, 195 (Mo.1959), the Missouri Supreme Court recognized that:

"It is sufficient if there is substantial evidence which shows that the injury is a natural and probable consequence of the negligent act or omission. And this can

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3 The United States Supreme Court in Lavender v. Kurn, 327 U.S. 645, 653, 66 S.Ct. 740, 744, 90 L.Ed. 916 (1949), aptly observed:

"Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

be determined by reasonable inference from proven facts or circumstantial evidence. Where the logical conclusion from the evidence is that if certain things were properly done certain results would not have occurred, and they *did* occur, the question of causal connection is sufficient to go to the jury."[4]

[7] There are many instances in tort litigation where precise causation becomes difficult to prove. There is no exact way to prove that the harm might have been avoided, because the harm did in fact take place. Thus, whether a fall in an inadequately lighted area would not have occurred if the premises had been properly lighted,[5] whether typhus disease would have been contracted if it had not been for a rat infested cellar of an apartment project,[6] or whether an explosion would have occurred even with proper ventilation,[7] each requires a judgment of whether the defendant's conduct causally contributed to the harm. A plaintiff does not have the negative burden to show that the harm could not have possibly occurred if the defendant had performed the duty breached. It would be absurd to say that a defendant could hide behind such absence of proof where his own conduct has created the fertile ground for harm and the harm did in fact occur. It has long been recognized that:

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[4] In Rovegno v. San Jose Knights of Columbus, 108 Cal.App. 591, 291 P. 848 (1930), the California court stated:

"[T]he only negligence alleged is the failure of respondents to provide a lifeguard or other person or persons skilled in life saving. Even had such a guard been present respondents urge, there is no showing that the boy's life would have been saved. Just what would have happened had a lifeguard been present is, of course, not capable of direct proof. It is largely a matter of speculation or of inference. Even so, it has been held that the question is one for the jury and not one for the court." 291 P. at 849-850.

[5] Swanson v. Goodwin, 327 S.W.2d 903 (Mo. 1959).

[6] State of Maryland for Use of Pumphrey v. Manor Real Estate & Trust Co., 176 F.2d 414 (4 Cir. 1949).

[7] Marshall v. Humble Oil & Refining Co., 459 F.2d 355 (8 Cir. 1972).

"[I]f the actor's negligence, either of act or omission, results in harm of the sort from which the duty was designed to protect the other, his negligence may be regarded as a substantial factor in bringing about the harm in spite of the fact that the same harm might possibly have been sustained had the actor not been negligent." State of Maryland for Use of Pumphrey v. Manor Real Estate & Trust Co., 176 F.2d 414, 418 (4 Cir. 1949).[8]

We conclude that the evidence was sufficient for the jury to pass on the question of proximate cause. Thus, we conclude the trial court erred in granting a judgment notwithstanding the verdict.

[8] The trial court also granted defendant's alternate motion for a new trial. Generally this court has upheld the exercise of the trial court's grant of a new trial as

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[8] See also Restatement (Second) of Torts, §433B, Comment a (1965).

"A mere possibility of such causation is not enough; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant."

This statement is to be balanced by comment b.

"The plaintiff is not, however, required to prove his case beyond a reasonable doubt. He is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough that he introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise. If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case. Thus when a child is drowned in a swimming pool, no one can say with absolute certainty that a lifeguard would have saved him; but the common experience of the community permits the conclusion that the guard would more probably than not have done so, and hence that the absence of the guard has played a substantial part in bringing about the death of the child. Such questions are normally for the jury, and the court may seldom rule on them as matters of law."

within his discretion. Silverthorn v. Hennigan, 439 F.2d 704, 705 (8 Cir. 1971); Bates v. Hensley, 414 F.2d 1006, 1011 (8 Cir. 1969); Simpson v. Skelly Oil Co., 371 F.2d 563, 566-567, 570 (8 Cir. 1967); Bankers Life & Casualty Co. v. Kirtley, 307 F.2d 418, 423 (8 Cir. 1962); Altrichter v. Shell Oil Co., 263 F.2d 377, 380 (8 Cir. 1959). When evidence is erroneously admitted or excluded or where the trial court has erred in the instructions to the jury, the trial court is considered in a better position to correct a manifest injustice in ruling on the motion for new trial. Under these circumstances the grant of the new trial does not interfere with the role of the jury as the trier of fact. Cf. Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251, 61 S.Ct. 189, 85 L.Ed. 147 (1940); Lind v. Schenley Industries, Inc., 278 F.2d 79, 90 (3 Cir. 1960), cert. denied, 364 U.S. 835, 81 S.Ct. 58, 5 L.Ed.2d 60. However, we are not faced with this kind of ruling here.

The basic ground relied on by the trial court for granting a new trial in the present case indicates that the court was greatly influenced by its appraisal that the evidence failed to make out a submissible case for the jury to consider. The trial court cited ten grounds for its conditional grant of a new trial. Seven of those grounds were repetititous of the grounds given by the court in support of its judgment n.o.v., relating to the lack of substantial evidence to support the verdict. For the reasons we have previously discussed, we feel the court's judgment n.o.v. was in error.[9]

[9] Defendant's motion also complains that certain testimony of Captain Klein was believed to be too speculative; however, the defendant never objected to its admission. We find no error in this testimony. The trial court also cited plaintiffs' failure to offer evidence of diversity of citizenship. The plaintiffs have belatedly introduced uncontroverted affidavits establishing their out-of-state citizenship for diversity purpose. It is fundamental that a new trial should not be granted to rectify such technical failure resulting in harmless error. See Fed.R.Civ.P. 61; Illinois Terminal R.R. v. Friedman, 208 F.2d 675, 680 (8 Cir. 1953). See also 6a Moore, Federal Practice, ¶59.08 [1], at 3774 & n. 8 (2d ed. 1971).

[9] Although the trial court does not make a specific finding that "the verdict was contrary to the clear weight of the evidence," this court has held that a finding that "the verdict is contrary to the evidence" is to be considered its equivalent. See Lack Industries, Inc. v. Ralston Purina Co., 327 F.2d 266, 273 (8 Cir. 1964). Thus, we conclude the only possible valid ground for the granting of the new trial was that the trial court felt "the verdict is against the clear weight of the evidence."

In Simpson v. Skelly Oil Co., 371 F.2d 563, 566-567 (8 Cir. 1967), this court recognized:

> "There is a difference in the function of a judge when he is ruling on a motion for a directed verdict or a judgment n.o.v. and when he passes on a motion for a new trial . . . In the former instance, it is his duty to accept the plaintiff's version as true for the purposes of the motion, notwithstanding the existence of strong testimony to the contrary; the judge is not concerned with the weight of the evidence. On the motion for new trial, however, he has wider, ***though not unlimited***, latitude and he may set the verdict aside where it is against the weight of the evidence, or to prevent injustice." (Emphasis ours.)

[10] Notwithstanding this broad latitude, as noted in the ***Simpson*** case, there exist some boundaries to the exercise of the trial court's discretion in granting a new trial. Although stated with reference to a judgment n.o.v., the Supreme Court in Tennant v. Peoria and Pekin Union Ry., 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944), explained: "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

We find, as have other circuit courts of appeals,[10] this admonition similarly applicable in dealing with motions for new trial.

[11-15] It has been recognized in the *Lind* case, supra, that where the trial court finds the verdict contrary to the weight of the evidence and grants a new trial that the appellate court should "exercise a closer degree of scrutiny and supervision . . . in order to protect the litigants' right to jury trial." 278 F.2d at 90. See also 6a Moore, Federal Practice, ¶59.08 [5] at 3819 (2d ed. 1971). Other circuit courts have expressed similar reservations although sometimes using different terminology. Thus, it has been held that a trial judge should not grant a new trial merely because he believes another result would be more reasonable. Duncan v. Duncan, 377 F.2d 49, 52 (6 Cir. 1967), cert. denied, 389 U.S. 913, 88 S.Ct. 239, 19 L.Ed.2d 260. Nor should a new trial be granted where there is no valid or useful purpose for submitting the case to another jury. O'Neil v. W. R. Grace & Co., 410 F.2d 908, 915 (5 Cir. 1969). Where the subject matter of the litigation is simple; where there exists no complicated evidence or where the legal principles presented are such that they would not confuse the jury, the court should be reluctant to grant a new trial. See O'Neil v. W. R. Grace & Co., supra at 913; Lewin v. Metropolitan Life Ins. Co., 394 F.2d 608, 614-615 (3 Cir. 1968); Tidewater Oil Co. v.

[10] See Beverage Distributors, Inc. v. Olympia Brewing Co., 440 F.2d 21, 24-25 (9 Cir. 1971), cert. denied, 403 U.S. 906, 91 S.Ct. 2209, 29 L.Ed.2d 682; Cities Service Oil Co. v. Launey, 403 F.2d 537, 539-540 (5 Cir. 1968); Duncan v. Duncan, 377 F.2d 49, 52 (6 Cir. 1967), cert. denied, 389 U.S. 913, 88 S.Ct. 239, 19 L.Ed.2d 260; Schybinger v. Interlake Steamship Co., 273 F.2d 307, 312 (7 Cir. 1959).

Waller, 302 F.2d 638, 643 (10 Cir. 1962). The Fifth Circuit in Cities Service Oil Co. v. Launey, 403 F.2d 537 (1968), following Hampton v. Magnolia Touring Co., 338 F.2d 303 (5 Cir. 1964), delineates a basis on which a trial court may require a new trial on the weight of the evidence. The court wrote:

> "Although the cases are not consistent in usage, some cases using the phrase 'clear weight' and others using the phrase 'overwhelming weight' or 'overwhelming evidence,' it seems clear that the jury's verdict must at least be against the *great* weight of the evidence before a new trial may be granted." 403 F.2d at 540.

Otherwise, the Fifth Circuit adds, it "would destroy the role of the jury as the principal trier of the facts, and would enable the trial judge to disregard the jury's verdict at will." We endorse these observations.

[16] Regardless of the rhetoric used the true standard for granting a new trial on the basis of the weight of the evidence is simply one which measures the result in terms of whether a miscarriage of justice has occurred. When through judicial balancing the trial court determines that the first trial has resulted in a miscarriage of justice, the court may order a new trial, otherwise not. As in so many other areas of the law, the trial court's judgment is always subject to review under the relevant criteria of law and facts at hand. See 28 U.S.C.A. §2106.

[17] In the present case we find that the evidence presented does not require reconsideration by a new jury. The evidence is such that reasonable men may differ as to the result, therefore, the determination should properly be left for the jury. See Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532, 538 (2 Cir. 1965),

cert. denied, 382 U.S. 983, 86 S.Ct. 559, 15 L.Ed.2d 472 (1966). As to the evidence within the record, there exists no significant weight factor favoring the defendant. In fact, in a second trial plaintiffs would be entitled to a favorable instruction on the St. Louis Building Code. We are hard pressed to say that a miscarriage of justice has taken place in the first trial. We cannot approve under the existing circumstances another time-consuming and costly trial without better justification on the record. All courts should be sensitive to and reasonably avoid crowded dockets. Cf. Blonder-Tongue Lab., Inc. v. University of Ill. Foundation, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971). Because no good purpose would be served by a second trial and weighing all relevant factors we hold that it was abuse of discretion to grant a new trial.

Judgment reversed and remanded with directions to enter a judgment on the verdict for the plaintiffs.

ON PETITION FOR REHEARING
EN BANC

MEHAFFY, Circuit Judge, joined by MATTHES, Chief Judge, dissenting from the denial of rehearing en banc.*

I respectfully dissent from the denial of the petition for rehearing en banc.

I disagree with that portion of the majority opinion which reversed the trial court's order granting a new trial and restored the verdict of something in excess of $200,000.00. In my view, the panel's holding in effect overrules a deeply embedded rule of law in this circuit and ignores the teachings of the Supreme Court in cases of this nature.

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* Judge Gibson did not participate.

The Eighth Circuit Rule.

In this circuit a "motion for new trial is addressed to the judicial discretion of the trial judge and will not be reversed except for a ***clear abuse*** of that discretion." Altrichter v. Shell Oil Co., 263 F.2d 377, 380 (8th Cir. 1959) (emphasis added); Bates v. Hensley, 414 F.2d 1006 (8th Cir. 1969). The rule has also been stated that the "granting of a new trial is a matter within the sound discretion of the trial judge and unless that discretion ***patently*** has been abused, his ruling is not subject to review." Silverthorn v. Hennigan, 439 F.2d 704, 705 (8th Cir. 1971) (emphasis added). The opinion in ***Altrichter*** gives some insight as to what these words "clear abuse" mean. In that case we held that the trial court could weigh the evidence, disbelieve witnesses and grant a new trial even where there is substantial evidence to sustain the verdict. No inferences are required to be drawn in favor of the verdict or the party against whom the motion is directed. The trial judge may grant a new trial where, in his own judgment, it is necessary to prevent a miscarriage of justice. I note the language of Barron & Holtzoff, quoted with approval in ***Altrichter, supra***, at 380: "It is his right, and indeed his duty, to order a new trial if he deems it in the interest of justice to do so."

Examples of Facts which Clearly Distinguish This Case from Those Cited in the Panel's Opinion.

The panel relied upon and quoted extensively from Captain Klein's testimony. His testimony was objected to as speculative and calling for a conclusion that the fire department would probably have stopped the fire before it caused plaintiffs' losses if he had received an alarm ten to fifteen minutes earlier. The panel's statement that Klein's testimony

was not objected to is clearly wrong. Although the trial judge overruled the objection, he assigned this ruling as one of his grounds for granting a new trial. Captain Klein had testified that the major portion of the fire was in building No. 11 behind the freight loading area of that building, that the fire was above the canopy of the northernmost bridge and just starting on the bridge, and that the bridge was not engulfed in flames at the time of the arrival of the fire department. He further testified that his men were putting water on one of the bridges until he ordered them out of the area. His testimony was to the effect that only building No. 11 was "heavily involved" at the time of their arrival. His testimony as to whether the bridge was on fire is controverted by the testimony of Captain Berne of the fire department, fireman Holland, and a railroad employee, Anielak, who had reported the fire and arrived at the scene before the firemen. Fireman Holland testified that he was one of the firemen on the ramp with the fire hose, that the water would not reach the bridge, that the fire eventually crossed the bridge into the buildings containing plaintiffs' insureds' property. Mr. Cohn, an expert witness, testified that fire started, not in building No. 11, but "towards the east end of the northernmost bridge." Evaluating the evidence according to the analysis of the trial court, Captain Klein's opinion as to whether the fire department could have stopped the fire was based on untrue facts and was speculative and conclusionary.

The trial court also stated that the evidence was insufficient to support a finding of negligence. Plaintiffs' proof was to the effect that a watchman should have been at this site because the site could not be made secure against entry. While there is some evidence to support this contention, much of plaintiffs' evidence relates to

buildings 11 and 12. Building 12 was in reality nothing but a wall with some supporting timbers. There was nothing to secure. Much of plaintiffs' evidence tending to show the unsecured condition of building 11 related to the first and second floors. The first floor was in fact a ground level railroad yard, and there was testimony that it was not considered part of the building. The second floor was an open loading area for trucks constructed of steel and concrete. It is apparently this area into which Captain Klein drove his car. There was nothing to secure except a large open area. There was ample testimony that passageways from these areas into the buildings were secured. Again viewing the evidence according to the analysis of the trial court, it is difficult to see any clear abuse of discretion in ordering a new trial on this point.

Further, a witness for one of the plaintiffs testified in effect that after collecting the insurance on some of his property he sold the insured goods at a price higher than their cost. He thus showed a profit instead of a loss. No damages should have been allowed on this point, and the trial court's order for a new trial should be sustained on this point.

By setting out the above, I have not implied that those points are the only ones to be considered. Rather, they are examples which support a finding that there was no clear or patent abuse of discretion in ordering a new trial.[1]

The Supreme Court's Teachings.

The panel's opinion relies on and quotes from Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520 (1944). *Tennant*, however, did not even

[1] The majority's opinion finds only that "it was abuse of discretion to grant a new trial."

consider a motion for new trial, but involved only a judgment n.o.v. granted by a court of appeals. This was an opinion by Mr. Justice Murphy for a divided Court. *Tennant* should be considered in the light of other Supreme Court cases such as Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 53 S.Ct. 252, 77 L.Ed. 439 (1933); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 at 247, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); United States v. Johnson, 327 U.S. 106, 66 S.Ct. 464, 90 L.Ed. 562 (1946), which did deal with motions for new trial. *See also* Neely v. Martin K. Eby Const. Co., 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967); Neese v. Southern Ry., 350 U.S. 77, 76 S.Ct. 131, 100 L.Ed. 60 (1955).

As Justice Brandeis said in *Fairmount Glass Works*, *supra*:

> "The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals." (Footnotes omitted) 287 U.S. at 481, 53 S.Ct. at 254.

In the same opinion Justice Brandeis went on to say:

> "Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct." *Id.* at 485, 53 S.Ct. at 255.

Similarly the Court stated in United States v. Johnson, *supra*, that:

> "[I]t is not the province of this Court or the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact." 327 U.S. at 111, 66 S.Ct. at 466.

The Court then went on to conclude that:

> "The circuit court of appeals was right in the first instance, when it declared that it did not sit to try de novo motions for a new trial. It was wrong in the second instance when it did review the facts de novo and order the judgment set aside." *Id.* at 113, 66 S.Ct. at 467.

Conclusion.

The panel claims in its conclusion that it is hard pressed to say that a miscarriage of justice has taken place in the first trial. The only sure way to prevent a miscarriage of justice in this case is to grant the rehearing and sustain the trial court's order granting a new trial. This is a complicated case with a lengthy record and it clearly requires something more than a weighing of the evidence when the trial court has concluded that it mistakenly admitted testimony which could well have influenced the jury. The effect of it cannot be ascertained except by a new trial.

The rationale of avoiding additional burdens for the court dockets, used as one of the reasons for reversing the new trial order, is misleading. There is no way to predict how much additional work will be created if the rule of this circuit in such matters is abrogated. If we

must follow the panel's new rule, it will place this court in the role of trying cases de novo for which we are not and cannot be equipped. Furthermore, this new appellate capacity threatens to erode the factfinding responsibility of the district courts.

Finally, I note that the panel's opinion finds there was an abuse of discretion. Certainly it is not an abuse of discretion to grant a new trial when inadmissible testimony is admitted. Now we can assume that every party litigant in a case where there is a new trial granted by the district court will contend that there is a mere abuse of discretion on the trial court's part; hence, the trial court's action should be reversed and judgment entered here.

For the reasons stated, I would grant the petition, uphold the trial court and send this case back to that court for a new trial.